

CHAPTER 8

PRICING PRACTICES AND RESTRICTIONS

A. INTRODUCTION

In this Chapter the following pricing practices, restrictions and related issues are examined:

- Section B: Legal Framework. This section examines the relevant statutory provisions in the UK and EEC.
- Section C: Price Fixing Simpliciter. Analysis of approach of Commission and OFT to different types of price fixing.
- Section D: Discount Schemes. Analysis of discounts with particular reference to aggregated rebate schemes. Also considered are loyalty rebates, turnover rebates, and other overrider rebates etc.
- Section E: Price Discrimination. Analysis of when differential discounts and prices are legal or otherwise.
- Section F: Predatory pricing. Analysis of price cutting designed to exclude or injure competitors.
- Section G: Excessive Pricing. Analysis of price exploitation by dominant companies.
- Section H: Resale Price Maintenance. Analysis of the legality of suppliers attempts to control prices in a distribution system.
- Section I: Equalisation of Receipts Schemes. Analysis of "profit pooling" schemes.
- Section J: Delivered Pricing (Base or parity point pricing). Analysis of methods of incorporating freight costs into price.
- Section K: Cost Calculation Models. Analysis of trade association practice of assisting members to calculate costs in an efficient manner, legal and illegal modelling.
- Section L: Renegotiation and Variation (Cost Escalation) Clauses. Standard form contracts may face problems where they incorporate unfair or unreasonable clauses concerning cost escalation.
- Section M: Collusive tendering. Parties who share out bids in response to invitations to tender will be subject to Articles 85 and the RTPA 1976. Analysis and guidance on how to detect collusion.

B. LEGAL FRAMEWORK

I. EEC Law

Article 85(1) EEC prohibits agreements or arrangements which "directly or indirectly fix prices or selling prices or any other trading conditions". Price fixing agreements whereby parties to the restriction agree on a set price to charge stand virtually no chance of being exempted from the prohibition in Article 85(3). It makes no difference whether the agreement relates to goods or services.¹ Nor does it matter whether the agreement is conducted by individual² firms inter-se or under the aegis of a trade association.³ Moreover, as with other forms of restrictive agreement, it makes no difference (other than factually in respect of evidence) whether the agreement is written down or simply agreed orally between the parties. Many price agreements are operated via trade associations and in this context it is important to note that recommendations to members made by the association and described as non-binding are invariably caught within Article 85(1). This surprises many trade association officials who argue that so long as their advice to the membership is not binding they cannot be accused of fostering agreement between the members. The view of the European Commission is that "recommendations" invariably result in "uniform and coordinated conduct"⁴ leading to restrictions on competition. The European Court has condemned recommended prices on the basis that they enable competitors to foresee with a reasonable degree of certainty what the price policy of their rivals will be.⁵ Parties cannot escape Article 85(1) EEC by arguing that the agreement was not effectively operated and that their were departures from it; Article 85(1) EEC is concerned with the effect of an agreement and not the loyalty of the parties to it.⁶

It should be noted that the operation of price agreements deemed unlawful under Article 85(1) and not susceptible to exemption under Article 85(3) EEC may be vulnerable to fines ranging from between 1-10% of total turnover on all goods and services in the previous year imposed by the Commission. Price fixing invariably attracts heavy fines.⁷

II. United Kingdom Law

Unlike EEC law which applies a sweeping ban on restrictive agreements the UK legislation is complex and obscure. Section 6 RTPA 1976 enumerates the agreements which are to be subject to the procedure of the Act. Section 6(1)(a) and (b) cover price agreements. Section 6(1)(a) provides that the

Act applies to agreements "in respect of":

"the price to be charged, quoted or paid for goods supplied offered or acquired, or for the application of any process of manufacture to goods."

Section 6(1)(b) applies the Act to agreements "in respect of":

"the prices to be recommended or suggested as the prices to be charged or quoted in respect of the resale of goods supplied."

Section 6(1)(a) and (b) are not all-embrasive, they exclude from the Act certain types of price agreement. These may apparently be carried on without the need to register:

- (i) Agreements whereby the parties notify each other of the prices they have charged, quoted or paid for goods. It would seem that an agreements between X and Y whereby the latter will - only minutes after concluding a transaction - communicate the price details to the former is not caught by the Act despite its obvious anti-competitive potential.⁸ This exception from the Act flows from the use of the future tense (i.e. "to be") in Section 6(1)(a) and (b). The draftsman omitted to include the additional words "or which have been charged, quoted or paid" etc.;
- (ii) The limited ambit of the words "to be" means also that another variety of price agreement is excluded from the RTPA 1976. An agreement concerning the price of the product concluded after the transaction is concluded is exempt. Thus, a trade association rule forbidding members to renegotiate the contract price in the light of fluctuating market prices for the commodity involved has been held by the Court of Appeal to be outside the scope of the Act.⁹

With regard to these exceptions three provisos should be noted. First, by virtue of Restrictive Trade Practices (Information Agreements) Order 1969 S.I. 1969 No. 1842, agreements whereby parties agree to notify each other of prices charged are now required to be registered thus partially plugging the gap created by exception (i) supra. For detailed analysis of this Order see Chapter 9. Secondly, businessmen should appreciate that simply because the agreement does not fall within the grasp of UK law it cannot be assumed it will escape EEC law. Article 85(1) catches agreements between parties situate in one Member State if the agreement, nonetheless, exerts an effect upon trade between Member State.¹⁰ Thirdly, pricing practices excluded from the ambit of the RTPA 1976 may fall within Section 2(1) Competition Act 1980 which controls anti-competitive practices. Agreements caught by the

RTPA 1976 are expressly excluded from the enforcement procedure under the 1980 Act but clearly practices excluded therefrom may be caught.¹¹ The 1980 Act is primarily focused upon restrictive practices by individual undertakings not acting in concert. However, a firm seized of a dominant or otherwise strong market position which employed that economic power to refuse to renegotiate contract prices once concluded despite fluctuations in contract commodity prices might fall within the Act; such a company could afford to act in this manner if it was confident there were few alternative supply sources for the purchaser to switch to.

Section 6(1)(b) RTPA 1976 brings under the control of the Act agreements whereby suppliers agree inter se that they will each recommend specific prices. This also applies to a trade association that recommends its members to adopt a fixed profit margin in sales to customers. Whilst resale price maintenance is generally outlawed it is legal for individual firms to recommend prices to dealers provided no steps (for instance boycott or blacklisting of the dealer) are taken to enforce the price. Agreements between suppliers to "recommend" prices however are considered potentially restrictive and are hence subject to control. It is uncertain whether Section 6(1)(b) covers the situation whereby X and Y merely agree to recommend prices without specifying the level of the price to each other. Section 6(1)(b) seems to require that the agreement be as to the price as well as to the fact of recommendation. The decision of the Court in Re Motor Vehicle Distribution Scheme Agreement¹² may be viewed as implying that this agreement would be registerable. In this case the Motor Trade Association introduced a written scheme which included a clause requiring members to prescribe the retail price of his products and the discounts that could be allowed. Later the scheme was amended to require each member to publish his resale prices. This was duly declared by the Court to be a restriction within Section 6(1)(b). Whether the earlier less coercive agreement was equally caught is unclear. The Court has held, in a case under Section 6(1)(c), that an obligation in an agreement not to do something, e.g. not to publish any daily newspapers for a period, was a registerable restriction.¹³ By analogy it is arguable that an agreement not to recommend a resale price is a restriction as to the prices to be recommended. Might the converse be true that an agreement to simply recommend prices is a registerable restriction as to the price to be recommended?¹⁴

Finally, a number of points concerning the language of Section 6(1)(a) and (b). First, "Price" includes a charge of any description.¹⁵ Secondly,

a restriction concerning any element of price at all is a restriction "in respect of" price within the meaning of Section 6. Hence a price agreement relating to a service to be performed on goods is a registerable agreement.¹⁶ Thirdly, "supply" includes, inter alia, lease or hire transactions.¹⁷

Practices not within the RTPA 1976 may fall to be examined under the CA 1980. Resale price maintenance is discussed within the context of the Resale Prices Act 1976 in Section H below.

C. PRICE FIXING SIMPLICITER

I. EEC Law

Price-fixing agreements whereby parties agree upon a specific price system for their activities may take a number of forms. There is but little chance that any will pass Article 85(1) EEC unscathed. The problem facing the businessman often lies in recognising that his type of price agreement is susceptible to legal challenge. The following is an enumeration of varieties of price-fixing agreement together with a brief assessment of economic effect and legal validity:

(i) Maximum Prices

Agreements not to exceed specified maximum prices are unlawful. Ostensibly a ceiling price aids the consumer. However, the adoption of prices set at such a level that, given the transport costs involved for getting the goods to the market, only domestic or local suppliers can afford to meet or undercut the maximum price, then competition is harmed. Such agreements operate to isolate markets preserving them for domestic sales.¹⁸

(ii) Minimum Prices

Agreements between parties to sell above a floor price are unlawful. Although price difference may occur above the agreed price attempts by parties to improve their market share by dramatically lowering their prices thereby risking starting a price war are prevented. The consumer may well be paying a supra-competitive price.¹⁹

(iii) Adherence to Price Lists

Agreements whereby parties agree to bind themselves to published price lists are considered to be serious infringements of competition rules. In I.F.T.R.A. Rules for Producers of Virgin Aluminium,²⁰ the parties claimed that departures from published price lists led to a

"falsification of competition". The Commission dismissed this argument reiterating its view that such behaviour constituted a serious restriction on competition.

(iv) Bargain and Introductory Prices

Agreements not to sell at introductory or bargain price are unlawful because they hinder the parties efforts to increase market share through temporary, attractive prices. They may also deter firms from introducing new product lines which could disturb the status quo between existing products by increasing the consumers choice since the inability to set tempting introductory prices to gain custom is a hindrance to entry of that market.²¹

(v) Disruptive and Dumping Level Prices

Agreements not to make shock or disruptive offers in another Member State or marketing territory are equally caught under Article 85(1) EEC. Where occasional loss-leader or cheap but above cost prices are quoted in another's territory they can seriously disrupt that market in the extreme destroying that traders business. Aggressive pricing of this nature in a competitive market exerts a healthy downward pressure on prices. It makes no difference whether the aggressors motives are related to a desire to increase his market share or are retaliatory. Curbs on predatory pricing do exist under Article 86 EEC. A dominant firm, may not predate, by below-cost pricing, on smaller undertakings so as to squeeze them from the markets thereby securing further their economic dominance.²² See F. below.

In IFTRA Rules for Producers of Virgin Aluminium the parties were ingenious in dealing with shock pricing, they categorised perjoratively such prices as "dumping level prices" i.e. prices sold abroad at levels below those set for domestic sales. They accordingly agreed not to "dump" in each others' territory. This prohibition was buttressed by reference to Article VI of the GATT which covers "dumping". The Commission rejected this argument upon the basis that the practice of dumping is no longer recognised within the EEC market: "A low-price sale from one Member State to another is no more subject to such rules than such a sale from one zone to another within the same Member-State. It is clear that the sole object and effect of the IFTRA rules relating to 'dumping', as far as sales from one Member State to another are concerned, is to prevent the type of unconventional competitive offer which is no longer prevented by any community legal provision."²³

(vi) Price Leader Agreements

Agreements whereby one party becomes the 'price leader' whose prices others will observe and adhere to are unlawful. Such agreements, "eliminate the possibility of unforeseen or unforeseeable reactions by competitors, thus removing a large element of the risk normally attaching to any individual action in the market".²⁴ As with other forms of price restriction they tend towards an isolation of markets and supra-competitive prices.

(vii) Meeting External Prices

This is similar to (vi) supra., agreements not to undercut a rivals prices in his primary marketing territory. Whereas in (vi) supra one price - the price leader's - will prevail across the market, here, a number of prices will prevail with each party illiciting the prevalent price in the export territory and following that. In Re European Glass Manufacturers the Commission condemned such an agreement on the basis that "such provisions thus tend to prevent competitive behaviour, such as the practice of the most efficient and viable undertaking offering lower prices than those of its competitors, or applying special prices and discounts to achieve penetration of the market".²⁵

(viii) Meeting External Aggregate Prices

The same prohibition as in (vi) and (vii) supra applies where the agreement is to meet and not undercut the aggregated market price for the export territory. The aggregation of prices is usually performed by a trade association and then disseminated to parties though may be performed by a price leader or other organisations. Such a practice has been categorised by the Commission as an "especially serious restriction of competition since its result is to prevent the economic integration of the Common Market and to deny the consumer all of its benefits in respect of the product in question."²⁶

(ix) Enforced Profit Margins and Price Rises

Agreements whereby parties set a common profit margin or agree simultaneously a percentage price increase are unlawful despite the fact that the agreement does not involve parties selling at uniform levels. The obligation is only to raise one's price - whatever that might be - by a fixed percentage. Freedom to choose an appropriate profit margin or select an appropriate moment for a price increase are important elements of price competition. Agreements of this nature tend to prevent fluctuations in market share and hence encourage ossification of the market.²⁷

II. Defences Rejected: EEC Law

Various excuses and justification have been argued by parties to price agreements. Often these are raised in the hope of ameliorating a fine rather than in the hope of earning exemption under Article 85(3). They are, nonetheless, interesting as an indication of Commission policy. (i) it is impermissible to introduce price controls for agricultural produce in the absence of common organisation of the market;²⁸ (ii) agreements preventing or deterring 'dumping level prices' on the grounds that the agreement is necessary to prevent the destruction of domestic industry are unacceptable;²⁹ (iii) the existence of governmentally imposed minimum or maximum price controls does not legitimate the operation of ancillary private restrictions.³⁰ In any event governmentally imposed controls may themselves be unlawful under Article 30 EEC which prohibits measures having equivalent effect to quantitative restrictions;³¹ (iv) the labelling of restrictive clauses as Fair Trade Rules or equivalent does not preclude antitrust intervention, if anything it encourages it. The authorities are interested in object and effect not appearances.³²

III. The Oligopoly Defence (Parallel Conduct or Conscious Parallelism): EEC Law

In ICI v. Commission (Dyestuffs)³³ the European Court accepted that identical pricing patterns amongst competitors may be explicable by natural market forces rather than collusion. This statement simply reflects accepted economic wisdom on "oligopoly" whereby it is natural in a market of only a few undertakings where the products produced are similar for traders to be sensitive to each others prices. In Dyestuffs the court stated that parallel pricing might be "natural" where:

- (i) There were only a few competitors controlling the market;
- (ii) the products were homogeneous or readily interchangeable, at least in the eyes of the purchaser; and
- (iii) the pricing structure of the market was such that competitors would be almost immediately sensitive to price changes effected by competitors.

The existence of these three factors alone, however, is unlikely to satisfy the Commission of the innocence of the parallel pricing regime. Other factors will have to be examined. Amongst these are included:
(1) Costs, do the parties bear similar production costs since "conscious parallelism" is more likely where costs are relatively uniform to all producers? However, even where products costs vary (e.g. one producers may be

integrated with a supplier of necessary raw materials thereby reducing costs) competitors might nonetheless feel the need to match each others prices. A, B and C might all charge £X per unit although because of variable costs A and B might earn 12% profit whereas C, who is integrated to his suppliers, might earn 17% profit. (2) Level of Use of Capacity, where capacity is underemployed and the level of stocks is high one would expect vigorous competition by firms anxious to unload capacity. Where the expected rivalry does not translate into price competition suspicions may be roused. Though, such parallel pricing might be accounted for by fears, independently entertained by traders, of a ruinous price war engendered by an unexpected lowering of prices. (3) The Age of the Market, old, mature probably contracting markets are populated by firms who are experienced in each others ways, probably content with their market share and hence reluctant to break the status quo through maverick pricing. The chances of parallel pricing occurring naturally are thus high. The converse may reasonably be expected from new, immature and expanding markets. (4) The elasticity of global demand, fixed demand by customers for an industry's products and the inability of those customers to change to rival supplier's products may account for price uniformity without concerted action by suppliers.

In essence traders arguing that parallel pricing is the consequence of natural market circumstances will have to prove the existence of those circumstances to the Commission or Court.³⁴ There is a danger that the authorities will view parallel pricing as *prima facie* evidence of collusion, accordingly, traders will find it necessary to "prove the market" by adducing empirical and/or expert evidence³⁵ and supporting economic theories.³⁶

The test applied by the authorities is whether the pricing conduct actually prevailing could be expected in natural circumstances. They will, thus, seek extrinsic evidence to determine how natural the prices are. The following are indicators of collusion:

- (i) The announcement of price moves prior to implementation including a sufficient interim time between announcement and implementation to allow the announcer to judge rivals reactions;³⁷
- (ii) The informal exchange of information on commercial matters of pricing usually deemed secret (stocks, production, orders etc.)³⁸
- (iii) The level of prevailing prices. If, given the costs and setting involved, profit margins of only 10% could be expected whereas margins greatly in excess are earned the authorities might consider that such

- profits could only result from collusion.³⁹
- (iv) The separation and isolation of markets may not be explainable by high freight rates.⁴⁰
 - (v) Export prices coinciding with local prices on the foreign market might suggest an agreement to respect home markets,⁴¹ as does any other systematic adaption to foreign prices. Though clearly exports must, to a degree, be sensitive to foreign prices.
 - (vi) The addition of surcharges for export contracts where the increment is unrelated to provable costs or risks again suggests concert.⁴²
 - (vii) The existence of interlocking directorates which act as channels for the reciprocal flow of confidential data and provide opportunities for concerted action.⁴³

IV. United Kingdom Law

The law as decided by the Restrictive Practices Court (RPC) has, with a few much criticised exceptions, invariably condemned price agreements. The OFT adopts a similarly strict approach. Indeed, the OFT invariably refer unregistered price fixing agreements to the RPC for an injunctive order to be made against the parties. The OFT have referred many hundreds of such cases. Invariably the action is undefended. Breach of a Court order is contempt of court (see Chapter 5 Section E) This section highlights the types of price agreement struck down by the court and invariably attacked by the OFT.

(i) Minimum and Fixed Prices

- (a) Minimum Prices: Whilst the Court has accepted that minimum prices are not as objectionable as fixed prices, since they do permit some degree of flexibility, it has, nonetheless, struck down almost all those appearing before it.⁴⁴ This injunction applies even where the effect of the price restriction is apparently negligible as where it is equated with costs and operates as a "stop loss" price⁴⁵ or, where the price of the commodity in question is only remotely connected to the price of the finished product. Moreover, the argument made in Yarn Spinners that abrogation of a minimum price agreement could lead to ruination of the industry has been held by the Court to be irrelevant.⁴⁶ It should be recalled, however, that Court decisions on this issue are in most cases more than 20 years old and that the RPC today might be more willing to take a sympathetic attitude to truly recession hit industries such as that in Yarn Spinners.

(b) Fixed Prices: Fixed price agreements are presumptively more serious restrictions on competition and will invariably be condemned by the authorities.⁴⁷ The only fixed price agreements escaping have exhibited exceptional market circumstances as well as reasonable prices and methods of computation. For details see (iii) below. A recent illustration revealing the consistently hard line approach of the OFT and Restrictive Practices Court concerned 26 sellers of household coal, anthracite and phurnacite in South West Wales.⁴⁸ These sellers abided by prices fixed by their trade association and circulated on a price list. In 1978 the Price Commission discovered the agreement and notified the OFT who commenced proceedings before the Restrictive Practices Court despite the fact that the parties terminated the agreement whilst claiming that the prices had never been binding in any event. This latter claim was clearly untrue given that summaries of minutes of meetings of the Association amongst documents registered on the restrictive practices register reveal that the association went to great lengths to agree on price levels with members and to impose pressure to conform on price cutters.⁴⁹ Special pleading for fixed price agreements invariably falls on deaf ears. In British Paper and Board Makers Association⁵⁰ the parties argued that the price-fixing agreement was to guarantee a standard annual price at which waste paper (an important raw material in the paper and board industry) was to be purchased from local authorities. This guarantee gave local authorities the security they required if it was to be economical for them to collect waste paper for sale. The Restrictive Practice Court replied that the price-fixing agreement was not necessary in order that adequate price guarantees be accorded to local authorities.

(ii) Attitude of the OFT

Businessmen cannot expect a sympathetic response from the OFT to their attempts to fix prices.⁵¹ Where trade association practices are moving into controversial waters the OFT will often require the association and members to give written undertakings that prices will not be fixed. Thus in one case concerning the Scots Timothy Seed Growers Association, the Association was required to sign a document which was placed on the Register of Restrictive Trade Practices

undertaking that their recommendations to members were not binding.

Further, that no recommendations would be made as to:

- the price at which an approved merchant could sell seeds to customers;
- the price the consumer would pay to his supplier for sowing seeds;
- restrictions on the movement of seeds within the United Kingdom or for exportation;
- varieties of "Timothy" seed which fall outside the quality standards set out in the associations rules; and
- the restrictions to be imposed upon Merchant members in buying seeds from sources other than the Association.

As with EEC law it matters not that the restriction relates to services. The OFT, for example, prohibited the Motor School Association of Great Britain from recommending "reasonable fees" to driving instructors for them to charge pupils. Undertakings, in triplicate, were required from the Association to this effect.⁵³ Evidence of a pragmatic approach by the OFT is found in their handling of the recommendations of the National Association of Drinks Manufacturers Ltd.⁵⁴ on the amount of deposit given on soda syphons. The Association made it abundantly clear to its membership that the recommendation was not binding. The OFT treated the case on the basis that since the deposit was refundable and a higher deposit would increase the incentive on consumers to return the bottles which, in turn, would prevent price increases (fewer bottles would have to be produced), a permissive response was appropriate.

(iii) Factors relevant in the negotiation or defence of price restrictions

From cases decided before the RPC a number of factors have arisen which might, if present in the circumstances of a price agreement, render it more acceptable. Though it should be stressed these factors derive from cases heard in the late 1950's and early 1960's and they have been much criticised for being too lenient on price fixing.

- (a) Reasonableness of prices: This has been treated by the Court almost as a sine qua non to the acceptance of a price restriction. To establish that a price is 'reasonable' it appears to be usually necessary to prove that the price covers overheads and allows only a small margin of profit.⁵⁵ This definition however, is not universal.⁵⁶ Prices that are fixed by reference to the maximum the market will bear have never been viewed as reasonable and will inevitably lead to the condemnation of the agreement.⁵⁷

- (b) Use of a Proper Cost Calculation Model: Businessmen employing a proper costing formula which can establish costs and profit margins stand a better chance of proving the reasonableness of their prices. In Permanent Magnets the Court thus commented: "The figures produced for this reference can, however, be taken as reliable and, no doubt many members of the association will have learnt much as the result of their production and analysis".⁵⁸ However, the Court has been critical where businessmen use "informed guesswork" to compute the appropriate price; they usually equate such guesswork with estimates of the maximum the market will bear and not with what is a reasonable return.⁵⁹ In Carpets the Court described prices so determined as "arbitrary".⁶⁰ Similarly, prices based upon average industry costs have been condemned. In Yarn Spinners the minimum price was described as,

"... an artificial price calculated on a hypothetical average cost. It does not represent the cost actually incurred by any individual mill and every mill will therefore be above or below it by a small or large margin."⁶¹

Average costs are only acceptable in cases such as Black Bolt and Nuts where the parties produced thousands of similar cost, similar type products such that individual costings were impossible.⁶² Nonetheless overall costings and profit figures were available revealing no great spread of costs and reasonable profits.

Where, because of the unusual nature of the industry, accurate analysis of prices and costs is impossible the Court has used a negative approach. Thus in Phenol⁶³ they concluded that the prices were unreasonable upon the basis that: (1) the price was almost certainly above that which would prevail in unrestricted conditions;⁶⁴ (2) the price was unrelated to production costs; (3) the price was computed by reference only to market capacity; (4) the price fixing scheme was rigid and not susceptible to variation.⁶⁵

- (c) Agreement keeps Prices down: In a number of cases the fact that the agreement actually led to reduced prices found favour with the Restrictive Practices Court. Thus in Glazed and Floor Tiles⁶⁶ the parties fixed the prices for standardised and unstandardised varieties of tile with the latter being upward of 25% more expensive than standardised types. This discriminated in favour of the

standardised products boosting their sales. Abrogation of the agreement would have removed the element of discrimination which was necessary to encourage the standardisation process. Standardisation uniformly resulted in economies of scale and hence lower prices. In Cement Makers Federation Agreement⁶⁷ a discriminatory multiple point base pricing scheme⁶⁸ gave the parties sufficient security to enable them to accept a lower return on capital than they would otherwise have done. This led to substantially lower prices. In Distant Water Vessels⁶⁹ a minimum reserve price at fish auctions prevented ruinous returns on capital forcing fishermen out of the market. Fewer vessels would have meant smaller overall catches, demand exceeding supply and rising prices. To establish that price restrictions reduce prices rather than raise them parties to agreement will have to furnish the authorities with convincing statistical and empirical evidence.

- (d) Agreement enhances International Competition: Agreements which enable the parties jointly to meet external competition more effectively thereby maintaining international competitive forces may succeed. It would necessarily have to be proven that in the absence of agreement the domestic firms would not be able to compete and that the market would fall prey to foreign companies.⁷⁰ In this context "foreign" means non-EEC.
- (e) Agreement saves purchasers "shopping time": In Black Bolt and Nut⁷¹ the price fixing agreement coupled to the inter-firm arrangement to supply by each other with varieties of the product not produced meant that a purchaser could satisfy his requirements from one supplier thereby saving significant administrative costs. This "shopping around" argument, however, has been rejected in all the other cases in which it was pleaded.⁷² It succeeded in Black Bolt and Nut because there were in excess of 3,000 varieties of the product available and purchasers orders were invariably complex.
- (f) Agreement Improves the Quality of R & D: Where a price agreement actually makes possible patent pooling and/or the exchange of technical data thereby improving industry standards of innovation the agreement might prove acceptable.⁷³

(iv) Factors Rejected as negotiating elements

Various factors have been rejected as proper defences to price restrictions. These will be briefly noted: (a) loss of price stability, stability is not considered a virtue since it may mean stability as a supra-competitive level;⁷⁴ (b) reduction in levels of investment, the argument that lower prices means lower profits means lower reinvestment and less incentive for outsiders to invest in the industry though perhaps feasible in extreme cases have never been accepted in cases presented to the Restrictive Practices Court;⁷⁵ (c) reduction to inadequate level of stocks, the nexus between drastic reductions in stocks and abrogation of a price agreement has never yet been accepted in a straight horizontal price scheme;⁷⁶ (d) increase in degree of concentration in the market, the Court has never been sympathetic to arguments that a price agreement has kept firms in existence and hence prevented the emergence of oligopolistic (or even monopolistic) conditions.⁷⁷

D. DISCOUNT SCHEMES

Discounts by providing the customer with a reduction on the list, normal or quoted price clearly are central in pricing policy. There are 2 main antitrust problems related to discounts. The first is discrimination whereby supplier X gives purchaser A a 15% reduction on the list price but makes B pay the full list price. By his pricing action X is affecting the competitive position between A and B to the latter's detriment. Secondly, where suppliers agree on a discounts policy the opportunity for individual suppliers to act competitively and award larger discounts is negated. Moreover, the opportunity for a purchaser to win greater discounts through more effective bargaining disappears. It is essentially with the second problem that this section is concerned. The first problem is dealt with in Section E below.

I. EEC Law

(i) Legal context

Agreements whereby parties supply or purchase according to uniform prices and discounts require little discussion for their incompatibility with Article 85(1) EEC to be established.⁷⁸ The same prohibition applies to agreements to adhere strictly to price lists and refrain from discounting. Thus in Re Gisa⁷⁹ members of a trade association of plumbing installation equipment were forbidden from discounting. The trade association rigorously enforced the rule by requiring members: to supply all invoices to its secretariat for checking; to allow it immediate access to offices and warehouses; and to pay fines for covert discounting. In their decision condemning the agreement the Commission stated that it deprived parties of the freedom to "... determine their own prices and conditions of sale and to attract orders for the articles in question to the detriment of their competitors by quoting lower prices, bigger discounts and better conditions of sale".⁸⁰ It is notable that the ability to set prices to ones competitors detriment is viewed as a central element of price competition. Similar prohibitions apply to schemes whereby groups of supplier grant rebates only to "approved" purchasers.⁸¹

(ii) Aggregated Rebate Cartels: Mechanism

The simple fixing of discounts presents few problems of either identification or legality. Indeed, businessmen are generally aware that fixed discount agreements are usually prohibited. Aggregated rebate cartels, however, are of greater complexity. A description of the mechanism of these schemes is as follows. An aggregated rebate is a discount calculated at rates which vary according to either the total value or the total quantity or the individual customers purchases from members of the group (usually the trade association). The characteristic features of such schemes are, first, an aggregation of the customers qualifying purchases, and secondly, an ascending ladder or scale of rebates such that the more the customer buys from the group (irrespective of how much he purchases from individual suppliers) the greater his rebate. Three main varieties of method for computing the quantum of rebate may be identified:

- (a) By total purchases from group during a given period. There is thus an incentive for the purchaser to continue buying from the group in order to increase his rebate.

- (b) By subdividing total purchases into rebate layers. Thus if a purchaser places £100,000 worth of orders with the group over a time period he might be given a rebate of 1% on the first £30,000, a rebate of 2% on the next £30,000, a rebate of 3% on the next £30,000 and so on. The benefit to the purchaser under this discount scheme may not be so pronounced as it is under (i) supra.
- (c) By granting a rebate for orders over a fixed threshold. For example rebates of 1.5% given on annual order exceeding £150,000. For the purchaser this is the least attractive scheme since if his projected orders do not exceed the threshold there is no incentive to purchase exclusively from the group.

Various methods of payment of rebate may also be identified:

- As a lump sum payable at the end of the year, though, payment may be at shorter intervals.
- As a lump sum with payment delayed until the end of the following year and perhaps dependent upon continued loyalty to the group.
- As a discount from current purchases calculated either by reference to total purchases in the preceding period, or, by reference to estimated sales for the current period with evidence of such sales deriving from the previous period and discrepancies found to exist at the end of the period being rectified by lump sum payments. This is the simplest payment method involving no cash collections and transfers. It benefits the purchaser who pays out in the first instance the final price.

Payments are usually made to purchasers by accountants operating for the group. The discount is paid for by the suppliers in proportion to the amount each has sold to the purchaser. Often the trade association makes itself responsible for collecting the sums from the suppliers and paying the purchaser though alternatively the trade association simply makes the calculation and notifies the suppliers of the amounts they owe various purchasers.

(iii) Legal objections to Aggregated Rebates

Industry views such schemes simply as methods of granting justifiable quantity rebates to high purchasing customers. However, these arrangements invariably presuppose the existence of price control and accordingly are viewed with great suspicion by antitrust authorities.

Companies operating such schemes argue that they ameliorate the anti-competitive effects of price-fixing since they permit variable prices to be charged and do not harm outside suppliers who can always match or beat the group's level of discounts. Moreover, if the group consists of large suppliers dealing with large purchasers and outsiders are smaller companies dealing with smaller purchasers then those outsiders will not be affected since buyers placing only small volume orders would not, in any event, qualify for rebates.⁸² In favour of such schemes it has also been argued that they keep smaller firms in business since if discounts were related to orders placed with individuals rather than the group purchasers would obviously deal with large suppliers carrying large stocks, this could lead to smaller firms being squeezed from the market. Furthermore, because a purchaser need not take exclusively from one supplier flexibility is introduced to the market; it permits purchasers to buy from sources at locations closest to him without harming his discount. For example, a building contractor operating nationally can reduce transport costs by purchasing materials near the site location rather than carrying materials with him. The same applies to the transportation of materials which are not heavy but are bulky or fragile. Suppliers likewise benefit since they can afford to specialise without needing to carry huge stocks, moreover, they can refuse orders without fearing that the customer will suffer loss.

These arguments though genuine are generally considered to be outweighed by the disadvantages. These are:

- (a) Suppliers cannot grant individually negotiated discounts but must abide by a commonly agreed rate.⁸³
- (b) Aggregated discounts are not determined objectively having no bearing to the relationship (measured in turnover) between a purchaser and supplier. In Re German Ceramic Tiles⁸⁴ the Commission objected to such a scheme on the basis that the discount scheme was "... independent of the economic relations in fact operating between a given producer and a given purchaser".⁸⁵ Such schemes take no account of the fact that one supplier might provide better services to purchasers than another. In Re Gas Water Heaters⁸⁶ the Commission thus commented that such schemes deprive undertakings, "... of the possibility of determining all their conditions of sale in accordance with their own judgment and

according to the services which the buyers do in fact give, quite apart from the category in which they are classed by the agreement." In essence aggregated rebates damage the prospects of durable supplier-purchaser relations.

- (c) Discounting is an essential ingredient of competition in oligopolistic markets predominated by only a few suppliers. It is often only through secretly negotiated individual rebates that price competition exists at all.⁸⁷
- (d) Aggregated rebates do not serve the same purpose as individual discounts. In the latter case individual economies of scale may be passed on. However, in the former case this will not necessarily hold true since the rebate does not reflect scale economies enjoyed by a particular supplier.
- (e) Aggregated rebates have been condemned in EEC law on the basis that they encourage purchasers to focus orders on the group to the obvious detriment of outsiders. This point was viewed as central by the European Court of Justice in Groupeement des Fabricants de Papiers Peints de Belgique v. Commission⁸⁸ where the Court stated that such schemes "... have the effect of concentrating orders with members of the [group] with the result that the customer who has already covered part of his requirements from these members in order to obtain the highest possible rebate".⁸⁹ In German Ceramic Tiles⁹⁰ this meant that purchasers concentrated on purchasing only from domestic German suppliers to the disadvantage of foreign suppliers seeking penetration of that market. In this sense aggregated rebates can prevent market integration.⁹¹ Where year to year loyalty is also rewarded by extra discounts the incentive to buy from outside of the group further diminishes.

(iv) Collective Price Discrimination by Discounts

A concerted attempt to favour one category of customer at the expense of another by means of discriminatory discounts where no objective reasons exist to justify the differentiation will infringe Article 85(1). Thus, if members of a trade association grant 15% discounts to P¹ but charge P² strictly according to a price list with the aim of harming P² relative to P¹ then a breach of Article 85 might have occurred. Such behaviour might additionally fall foul of Article 86 EEC if the trade association represents members who combined possess a dominant position on the market. Differentiation, by means of

variable discount, between purchasers is justified if it is closely related to quantities purchased thereby enabling the supplier to realise scale economies which may be shared (in the form of the discount) with the customer. It should be noted, in this respect, that Article 85(1)(d) prohibits agreements which:

"apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

(v) Justifiable discounts

Discounts are justifiable where attributable to savings made by the supplier on a transaction. These savings may be based on promotion costs, transport, invoicing and handling of goods etc. In essence quantity rebates are perfectly legal. Further, if purchaser X buys in bulk and hence saves supplier Y money then it would be unfair on X for Y not to pass on some of the scale economies to him by way of discount. Suppliers, in granting discounts may be accused of discriminating in favour of that purchaser by a rival purchaser who is denied such advantageous terms. Suppliers may justify their discounts by reference to detailed costings. Where these are unavailable the Commission accept cost justifications based upon such statistics and data as the supplier can muster.⁹²

(vi) Non-Justifiable discounts

Where the discount is found to be unrelated to scale economies or other justifications then the supplier might be liable to a charge of discriminatory or exclusionary practices.

- (a) Fidelity or loyalty discounts: Discounts given to purchasers who take all or a given percentage of their requirement from the supplier may have the effect of excluding rivals from customers. The discount operates as an incentive for the purchaser to increase his purchases from the supplier to the exclusion of rival suppliers. Purchasers become linked to suppliers and rival suppliers are denied sales opportunities. Where the supplier holds a dominant position the discount almost certainly infringes Article 86 EEC.⁹³
- (b) Target discounts: Where a dominant supplier sets a series of targets based upon purchases from the supplier which, if met by the buyer, entitle him to a discount Article 86 might be infringed. In Michelin the supplier instituted a system of discounts conditional upon the attainment of sales targets. As a buyer exceeded the threshold for each target his discount increased. The system was

operated in an informal manner so that dealers were unaware of the consequences of attaining their targets or failing to do so. The European Court commented that the system was designed to impose pressure on Michelin purchasers to remain loyal to Michelin. The Court concluded:

"All those factors were instrumental in creating for dealers a situation in which they were under considerable pressure, especially towards the end of a year, to attain Michelin NV's sales targets if they did not wish to run the risk of losses which its competitors could not easily make good by means of the discounts which they themselves were able to offer. Its network of commercial representatives enabled Michelin NV to remind dealers of this situation at any time so as to induce them to place orders with it.

Such a situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage. It thus limits the dealer's choice of supplier and makes access to the market more difficult for competitors. Neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer's freedom of choice and independence. The position of dependence in which dealers find themselves and which is created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified."⁹⁴

- (c) Optional discounts and "English Clauses": A dominant supplier who requires purchasers to notify it when a rival supplier offers more favourable terms coupled to an option exercisable at the instance of the dominant supplier to match the rivals offer or allow the buyer to accept supplies from the rival infringes Article 86. Such clauses have a number of interrelated anti-competitive effects: first, they tie customers to the dominant supplier; secondly, they interfere with competition between the dominant supplier and other suppliers; thirdly, they enable the dominant supplier to learn of its rivals prices and terms and conditions of sale; fourthly, they enable the dominant supplier to determine whether his rivals should win an order or not; and fifthly, the rebate made to the purchaser will not be based on economically justifiable grounds and will invariably involve discrimination as between buyers.⁹⁵

An "English clause" covers an option granted by a supplier to

a purchaser who has accepted a purchasing obligation viz-a-viz the supplier allowing the purchaser to take from rival suppliers if the main supplier is unable to match the rivals price or supply in sufficient quantities. This is clearly different from the clause described above in which the option rests with the supplier not the buyer. "English clauses" when properly used are a means of reducing the anti-competitive effects of exclusive purchasing agreements and used properly are welcomed by the Commission.⁹⁶

II. United Kingdom Law

(i) Aggregated Rebates

The description of mechanisms and the discussion of surrounding arguments and conclusions made in respect of EEC law apply with regard to the UK. The problem of collective discounting was recognised and discussed by the Monopolies and Mergers Commission in a benchmark Report of 1955 - "Collective Discrimination: A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices."⁹⁷ The Report concluded that all of the types of practice referred operated against the public interest. However, it did state that in exceptional cases the practices might be justifiable. The Report was partly responsible for the cartel legislation which was subsequently enacted. With respect to aggregated rebate scheme the Report states: "Aggregated rebates accentuate the more dangerous features of common prices and that this effect generally outweighs any advantage which such rebates have in assisting the smaller manufacturers operating within the common price system."⁹⁸ However, "... an aggregated rebate might in certain exceptional circumstances be an essential feature of a common price system which might itself be found to be in the public interest."⁹⁹ The judgment of the Restrictive Practices Court in Re Cement Makers Federation Agreement¹⁰⁰ sums up the attitude of UK law:

"It has not been seriously argued by the federation that there is any economic justification for a rebate calculated on the total tonnage purchased by an individual purchaser or merchant from all manufacturers. There may well be economic justification for charging a lower price for large orders from a single manufacturer, and in an industry such as the cement industry, where considerable economies in cost may be obtained by working to capacity, there may also be economic justification for charging a lower price to a purchaser who places large orders for cement from a single works during the course of the year, but the effect of a rebate granted irrespective of whether

orders are placed for cement with one works or forty-nine different works is to create a privileged class of purchaser and under the method of fixing price adopted by the federation and based upon the overall profits of the industry, any reduction in price to this privileged class must be at the expense of the majority of purchasers who are not entitled to the rebate".¹⁰¹

Furthermore the system has,

"... the positive disadvantage of discouraging purchasers from buying cement from non-members of the federation, thus making it more difficult for a member to resign from the federation or for a new manufacturer to enter the industry without joining the federation."¹⁰²

Thus, the only hope in the UK law is apparently as a necessary support to a price agreement deemed to be in the public interest. However, the two are not necessarily connected since in the Cement case the price agreement was upheld whereas the aggregated rebate scheme was struck down. Discounts will be acceptable where they are individually negotiated and only to the extent that the reduction in price, "... corresponds broadly to savings in cost of production, delivery, or sale due to the size, regularity, or nature of the order."¹⁰³

(ii) Other Discounts subject to the RTPA 1976

Agreements, perhaps in the form of standard form contracts recommended by trade associations, which advocate concerted behaviour on discounts are registrable under Section 6(1)(a) and/or (b) and/or (c) RTPA 1976.¹⁰⁴ Where the agreement seeks to prevent all discounts, limit the extent of discounts, regulate the purchasers who may be given discounts etc. then the chances of Section 21(2) dispensation are remote.¹⁰⁵

(iii) Discounts and the Competition Act 1980: Types of Discount

Generally problems with discounts arise in the context of dominant concerns.¹⁰⁶ Accordingly, the OFT are most likely to review discounts under the CA 1980.¹⁰⁷ The list below describes some of the discount systems which may give rise to concern under that Act:

- (a) Favourable terms for delivered quantities: These take the form of discounts based upon large delivery quantities being granted to favoured customers who only purchase small quantities i.e. the discount is not justified by scale economies on delivery.
- (b) Retrospective discounts or rebates: These discounts which are often called "overrider" discounts may be accorded a purchaser at

the end of the year (or other discount reference period) for the fulfilment of certain conditions by the latter. The conditions are usually in the form of the achievement of pre-determined sales targets. Alternatively there may be a series of ascending targets attracting ascending rates of discount. Such systems have been condemned by the European Court in the Michelin case described above. The MMC have concluded that overrides are likely to be anti-competitive where they are operated by a supplier with significant economic power. Though their tone is not always critical of such rebate systems.¹⁰⁸ In their General Report on discounts the MMC concluded that discounts the rates of which were related to the volume of the customers purchases or the size of his account were of equivocal effect. No generalised conclusions could be derived. In particular they made a number of points which may be relevant in predicting OFT policy under the CA 1980

- Where the discount increases as the volume of purchases increases so that there exists an incentive to keep with a single supplier then a barrier exists to rival suppliers wishing to sell to a customer. Often, this tying effect (of customer to single supplier) is temporary, typically three months to a year. At the end of the relevant period each buyer can without loss switch to another supplier. Though this ability to compete with a supplier at the end of the accounting period will be lessened if there is a follow over effect from one accounting period to the next e.g. discounts are 10% in first year but 12% in the next year if the customer obtained the maximum discount in the year just past i.e. incentives exist for the buyers to stay with one supplier from one accounting period to the next.
- Overriding is unlikely to be a problem in trades where purchasers (wholesalers or retailers) need to supply their customers with a wide range of different brands. In such markets purchasers will necessarily take from many suppliers.
- Overrides may be anti-competitive where applied across the whole range of a suppliers goods.¹⁰⁹ These discounts are given by reference to total purchasers of all goods and not by reference to total purchases of different types of goods. The incentive here is for the buyer to keep taking a range of goods from the supplier.

- Overriders may constitute a barrier to entry to new suppliers. Thus, if a purchaser is tied by the discount incentive to remain with a single supplier the opportunities for rival suppliers to compete are reduced.

- The MMC concluded:

"It appears to us that all discounts, the rates of which are related in some way to the volume of the customer's purchases or the size of his account, may have the effect of encouraging the customer to concentrate his purchases, and to this extent they may be said to have some 'tying' effect. Even a scale of delivered quantity discounts may have this effect. Overriders and other discounts conditional on the buyers specific performance may in certain circumstances have anti-competitive effects, especially when accorded by dominant suppliers, but in general overriders accorded to large retail buyers are to be regarded as part and parcel of competitive selling terms. They do not, in our view, cause these buyers to concentrate their purchases to a significantly greater extent than other types of discounts related to the volume of their purchases. The preferential terms which large buyers are in general able to obtain compared with small buyers appear to us to be of greater economic significance in the context of our reference than the particular form which a volume-related discount may take."¹¹⁰

In sum, the MMC have not adopted a particularly robust view towards volume related discounts. The OFT may well be conditioned in their thinking by this report.¹¹¹ If complainants wish to challenge such discounts and they can prove some effect on trade between the Member States of the EEC then a complaint to the Commission may prove more worthwhile. An effect on inter-state trade may occur if foreign suppliers or importers or vendors of goods produced elsewhere in the EEC are hindered, by the discount policies of major UK suppliers, in their attempts to sell their goods in the UK.

- (c) Discounts for membership to suppliers network: Many suppliers supply to authorised and non-authorised dealers. As an inducement to belong to the suppliers network discounts over and above those accorded to non-authorised dealers may be granted to authorised dealers. The OFT were critical of such a system in Still Service Ltd.¹¹² where the manufacturer gave additional discounts to dealers appointed by them as distributors of Still original equipment. The OFT noted that the discounts were not related to

size of order or to the manufacturers production of distribution costs. They held the discounts to be anti-competitive, in particular they stated that they gave appointed dealers an unfair cost advantage over those not appointed and moreover they could act as an entry barrier to those dealers considering entry to the market.¹¹³ In September 1982 to avoid a reference to the MMC the Company gave undertakings to the OFT by which, inter alia, they undertook not to grant any discounts which had the effect of discriminating between customers. The undertaking did allow the company to grant justifiable discounts reflecting cost economies in the suppliers production or distribution system.¹¹⁴

- (d) Differential Credit terms: Discrimination based upon differential credit terms is rare. However, many suppliers do not apply their credit terms strictly so that certain powerful customers may enjoy better credit terms than others. Anti-competitive discrimination can arise in such circumstances.
- (e) Promotional discounts: Suppliers may offer discounts to encourage buyers to undertake promotional selling. Special prices of this nature are likely to enhance inter-brand competition if they lead to more intensive selling of the product. However, where the special prices are offered over a long period of time or on a regular basis then the promotional activity may merge into ordinary price competition and the opportunity for discriminatory anti-competitive effects increases.¹¹⁵
- (f) Non-price, cost-saving assistance: Suppliers need not necessarily discriminate overtly between customers by granting differential discounts, they may discriminate indirectly by affording certain favoured buyers non-price related help. Thus for example suppliers might provide: shelf-filling, labelling and/or price-marking services; technical training for staff; special delivery services; warehouse or shop equipment; goods in special containers to customer's requirements etc. Such assistance by the supplier obviously saves the buyer money and as such can influence his costings when selling price is being determined. If the supplier enjoys dominance discrimination between buyers can effect their competitive position inter-se.¹¹⁶
- (g) Advantages not involving reduced price: Where the supplier provides financial support that is unrelated to supply price the effect can

be to reduce the buyers costs thereby enabling him to resell the goods more cheaply. Thus, for example, suppliers might provide: advertising help, promotion fees, free guarantee services, payment for the buyer organising special displays etc.¹¹⁷

- (h) Advertising discounts: If a dominant supplier accords discounts where the buyer agrees to set aside all or a specified percentage of his advertising space to the suppliers goods, the discount may be anti-competitive where rival suppliers goods are being excluded from advertising space.¹¹⁸

(iv) Discounts and Payment of an Agents' Commission

In recent years the OFT have sought to combat price discrimination through discounts in the context of payment for agency services. An important step in OFT policy development derives from their investigation into Yellow Pages Advertising.¹¹⁹ British Telecommunications (BT) owns Yellow pages directories (YP). For a number of years BT had granted a 10% discount to advertising agents who placed adverts in YP. By this discount BT hoped to encourage agents to place a higher percentage of their advertising revenue with YP. The discount proved ineffective as an incentive and in early 1981 BT suddenly withdrew the discount. Advertising agents complained to the OFT alleging that the withdrawal of the discount was anti-competitive, it meant that agents had to raise prices to their customers. The OFT, following an investigation into this and other matters, concluded that BT's sudden withdrawal of the discount was not anti-competitive though they accepted that it had exerted a "disruptive" effect upon the market. The OFT pointed out that the discount had been discriminatory since firms and others who sought to place adverts direct in YP without the intermediary services of an agent did not receive the discount. Moreover, the OFT objected to the discount system since it had led to an artificial method of payment of agents fees. Agents would be given their commission by the media based upon the value of advertisements booked through the agency. The commission varied between 10-15%. The OFT's comments upon this are important for any principal/agent relationship. The OFT were critical of the system whereby the principal (the advertiser) avoided paying the agents commission because it was taken in the form of a discount from the media. The OFT raised two main objections:

- First, the system obscured the working of the market for agency services in a manner that is not possible if the client pays directly for the services provided it.

- Secondly, the system may be discriminatory if different commission rates or terms are obtained by different agencies from the same supplier of advertising space.

The principle that agents should be paid by clients and not third party suppliers of services has been applied by the OFT to the insurance market. Here the OFT have negotiated with the Industry to encourage them to change to a system whereby brokers are paid by policy holders and not Insurance Companies. This change in method of payment, the OFT believe, would help eradicate the scramble by Insurers to gain business by increasing the discounts to brokers.¹²⁰

(v) Attitude of the OFT and MMC

Prima facie discounts should be related to costs. However, the MMC has accepted on a number of occasions that suppliers will not be acting unlawfully by giving non-cost related discounts where they are granted to a powerful buyer who can exert its own "muscle power". Moreover, they have also stressed, as have the OFT under the CA 1980, that discounts must have some appreciable effect to be anti-competitive i.e. a de minimis rule applies.¹²¹ On this point however it is worth noting the dictum of the European Court in Michelin when confronted with the argument that the rebate gradations were too small to be significant:

"In this regard it must first be stated that the variation of 0.2 to 0.4 per cent. as established during the procedure before the court, in the discounts based upon the attainment of the sales target is indeed slight. Nevertheless the effects of the discount under discussion can by no means be assessed solely on the basis of the percentage variation in the discounts linked to the targets.

The discount system in question was based on an annual reference period. However, any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of the period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period. In this case the variation in the rate of discount over a year as a result of one lost order, even a small one, affected the dealer's margins of profit on the whole year's sales of Michelin heavy-vehicle tyres. In such circumstances, even quite slight variations might put dealers under appreciable pressure."¹²²

Thus small rebates, depending of course on the market context, can have an appreciable effect when they operate over a long reference period.

In the final analysis it will probably be the exclusionary effect of a discount i.e. does it exclude rival suppliers, which will be the determining factor.¹²³

E. PRICE DISCRIMINATION¹²⁴

Price discrimination is often achieved by means of the grant of differential (discriminatory) discounts. These are discussed in Section D above. In this section the practice of charging different customers different prices will be discussed. The discrimination here is hence similar to that in Section D above. Price discrimination may loosely be defined as the failure to charge customers according to the cost of supply. If Supplier X charges 10 units per item to A and 8 units per item to B then X has influenced the competitive position between A and B to the former's detriment. Some dominant firms may employ price discrimination in a geographical way. Supplier X charges 10 units in the United Kingdom, 12 units in France and 14 units in Germany, the differential being designed to exploit the maximum price the market in each area will yield. The price charged in these countries is not related to cost but is, rather, related to a profit maximising objective. On the plus side economists recognise beneficial aspects to price discrimination. A public transport authority that grants concessionary rates to old age pensioners, youths and the unemployed might create a demand for the transport service that would not exist in the absence of the discrimination and simultaneously serve social purposes.

I. EEC law

(i) Price discrimination by Dominant firms

The European Court has adopted a strict approach to price discrimination. They have held that substantial price differentials are strong evidence of discrimination in the absence of objective justification.¹²⁵ Moreover, that price discrimination is almost always an infringement of Article 86 EEC where the defendant holds a dominant position.¹²⁶ The defence argument that discrimination was forced upon the defendant by the muscle of a dominant purchaser is generally rejected.¹²⁷

The European Court, and the Commission, lay great store by the need to avoid artificial divisions of the Common Market. Practices

which reinforce national boundaries are hence viewed as particularly serious. A supplier who, having instituted differential pricing in different Member States, seeks to enforce those differentials runs the risk of large fines. In United Brands¹²⁸ the supplier imposed price differentials for supplies of bananas. To prevent entrepreneurs buying bananas in cheap territories and transporting them to expensive areas and there undercutting the prevailing price level, the supplier contractually prohibited cross-supplies of green-bananas between dealers in different Member States. The "green-bananas" clause prevented cheap (unripe) bananas being sold in expensive areas, bananas cannot be transported in a ripe state. By this clause the supplier sought to maintain the differentials. The Court held this practice to be an abuse of a dominant position.

As a general proposition prices should be related to cost. Thus differentials should be justified by reference to scale economies and other savings enjoyed by the supplier.

Discrimination may occur through the application of a single price to customers who are different and justify different treatment. The most common example of this is found in base point or delivered price systems. These are discussed in Section J below.

(ii) Price discrimination and Article 85

Price discrimination is invariably a function of dominance. However, where rivals agree as to prices then discrimination may result from the agreement. Thus, a trade association whose members adopt base point or delivered pricing may infringe Article 85 (see Section J below). Similarly, an agreement whereby competitors agree not to give discounts discriminates against purchasers who deserve discounts e.g. because they buy in bulk, or collect the goods ex-works rather than have them delivered etc. Where members of a trade association seek to maintain joint control of a market by selective rebates to customers which have the effect of excluding new customers an unlawful agreement contrary to Article 85 and an abuse of a dominant position might arise.¹²⁹

II. United Kingdom

(i) Price discrimination and the MMC

The MMC has only condemned price discrimination where practiced by dominant concerns.¹³⁰ They have objected where the practice has been used, or has had the effect, of creating entry and expansion barriers to

other suppliers. Thus, if X a dominant concern charges discriminatorily low prices to customer Y as a specific inducement to keep Y "sweet" and prevent rival suppliers selling to him then the practice has an exclusionary effect and is anti-competitive.

Conversely the MMC has found that price discrimination is not necessarily anti-competitive. In Reprographic Equipment,¹³¹ Rank Xerox dominated the copier market. They discriminated in charges for rental of the machines by increasing the charge with the number of copies taken from the machine. The rate of increase in charges was not related to the increase in use of the machine by the customer, nor was it related to the increased cost of supply and servicing that would occur with greater use. Thus, more intensive users paid proportionally more per sheet than did less-intensive users. However, this discrimination was considered justifiable. The MMC accepted that it was necessary for intensive users to subsidise less intensive users on the basis that if the latter were forced to pay the full cost the charge would have been prohibitive and use of the machines would have been discouraged.

The most comprehensive statement of principle by the MMC on discriminatory pricing is as follows:

"The prices to individual buyers should be related to the cost of supplying them and to the value of the business to the supplier. Since distribution costs vary with the quantities delivered the most appropriate method, and the one most conducive to efficient distribution, is a suitable scale of discounts related to the size or value of individual consignments. We would, however, see no objection in the circumstances of this industry to terms which also, if a manufacturer so wished, give some recognition to the size of the whole order (covering more than one consignment) or to the value of the total business which a buyer places with him. We would also see no objection to the provision of different scales of discounts for wholesalers, retailers and other buyers if the manufacturers considered it desirable to give wholesalers and retailers some extra reward in recognition of their part in selling and distributing. We can see no reason, however, for any differentiation in treatment between one class of user buyer and another which is not related to the cost or value of the business to the supplier."¹³²

(ii) Price Discrimination and the OFT

The OFT have undertaken one examination of the practice under the CA 1980. In British Railways Board (Facilities for Car Hire and advertising of self-drive vehicle hire at railway stations)¹³³ the OFT

investigated BR's policy of allowing one car-hire firm an exclusive right to provide services at BR stations. The selected firm - Godfrey Davis (Car Hire) Ltd. - set prices according to a costing calculated on all of the stations. The firm stated that if they had been forced to price their services by reference to costs at each individual station then approximately 50% of the stations would have been unprofitable. Thus by charging a price related to overall cost and not individual cost the car-hire firm discriminated against customers at profitable stations who subsidised customers at unprofitable stations.¹³⁴ The OFT apparently did not object to this pricing system.¹³⁵

The OFT will almost certainly adopt a similarly pragmatic line to that of the MMC though their analysis, unlike that of the MMC, cannot take into account public interest arguments. This may hinder parties being able to defend and justify their conduct upon an adequate basis to the OFT. Thus, an argument in the car-hire case above that consumers benefited from the price practice in the form of a more widely provided service would be immaterial for OFT purposes but relevant before the MMC.

F. PREDATORY PRICING¹³⁶

Predatory pricing is generally defined as selling below cost.¹³⁷ A dominant firm might undertake this in a market in order to exclude a competitor there. There may be a number of reasons for this conduct. First, a supplier might use below-cost selling to destroy a rival in the expectation that once the rival has exited the market the predatory firm will recoup his losses by charging excessive prices. Secondly, a supplier might fear a new entrant so lower prices below cost to deter the new firm from entering the market by the threat of aggressive competition and low-profits. Clearly, such conduct has a harmful effect on the market. Where practiced by a dominant concern it will almost certainly be abusive. Often dominant firms will subsidise their below cost prices with profits from other profitable lines or with profits from other areas where the supplier enjoys a monopoly and high profits are being yielded.

Not every low price is anti-competitive. Introductory bargain prices offered by new suppliers with the objective of obtaining a toe-hold into a market are designed to enhance not destroy competition.¹³⁸ If supplier X

slashes his price to customer A in direct response to a competitive offer to A by supplier Y then X is simply meeting Y's competition and is not acting anti-competitively. Differentiating competitive from anti-competitive low price is thus not easy. Predatory (anti-competitive) pricing will generally exhibit a number of characteristics:

- (i) Price is set below cost.
- (ii) Below cost price offered on a systematic basis.
- (iii) Losses incurred by predatory supplier may be compensated for by cross-subsidisation from other product lines or excessive profits made elsewhere from the same product.¹³⁹
- (iv) Supplier has a predatory design on a competitor or an exclusionary design with respect to a potential competitor.
- (v) The predatory price may have the objective of protecting or increasing the suppliers long-term market power.¹⁴⁰

I. EEC Law

Complaints alleging predation have rarely been made to the Commission. Though in 1983 the Commission issued an interim measure (like an interlocutory injunction) against AKZO (UK) who were alleged to be predatory pricing.¹⁴¹ The complainant to the Commission, Engineering and Chemical Supplies Ltd. (ECS) were manufacturers of benzoyl peroxide, a product used in flour milling and as a catalyst in the chemical industry. When ECS expanded output so as to exploit export potential in plastics rivals from AKZO in both the UK and Holland threatened selective and very large price reductions on the milling side if ECS refused to abandon its efforts in plastics. Indeed AKZO threatened to put ECS out of business. The Commission undertook surprise visits to AKZO offices in Europe and discovered documentary evidence substantiating ECS's allegations. The Commission issued an interim measure (pending a final decision) ordered AKZO to return to previous price levels but allowing the firm to meet competition from other suppliers.

II. United Kingdom

(i) OFT attitude

The OFT receive a number of complaints each year concerning predatory pricing. The majority of these cases prove unfounded and the low prices complained of turn out to be evidence of competitiveness rather than anti-competitiveness. The approach of the OFT under the

CA 1980 was indicated in the investigation into Scottish and Universal Newspapers Ltd.¹⁴² (SUNL). This case arose from the conflict between free and paid-for newspapers. During 1982 the OFT investigated the response of SUNL to the issue of a free newspaper by a rival publishing house in the Hamilton and Motherwell District and adjacent areas of the old county of Lanark in Scotland. SUNL sought to prevent the issue of the rival paper or destroy its feasibility if it were printed. To achieve this they issued their own competing free newspaper, the Lanarkshire World, within a week of the launch of the rivals new paper. Moreover, "they gave away large amounts of free advertising space over an unreasonable period initially with the condition that the advertiser should not take advertising space in another free paper in the region. Furthermore, they priced a high percentage of their advertising space at below the marginal cost of its production and distribution. The OFT concluded that the conduct of SUNL was designed to frustrate the viable establishment of a competitor and, in the longer term, to protect its own profitability.¹⁴³ To avoid a reference to the MMC, SUNL gave undertakings to the OFT, inter alia, not to supply or offer to supply advertising space to any person at a charge "which does not equal or exceed that part of the marginal cost of producing and distributing the [Lanarkshire World] attributable to that advertising space".¹⁴⁴

The OFT have thus confirmed that their objections to predation are based: (i) on the exclusionary effect of the practice; and (ii) on the design of the predator to secure its long-term dominance. These conclusions generally bear out the policy of past MMC reports.¹⁴⁵ Though in one instance they were critical of the below-cost pricing for domestic electrical goods of the London Electricity Board who, primarily through inefficiency rather than predatory design, sustained the low price through cross-subsidisation from profits earned in electricity supply.¹⁴⁶

(ii) Whether Introductory discounts are predatory

In the SUNL case (above) the OFT commented:

"When a new product is launched, it will tend initially to be at a disadvantage in the market because it is unknown and commands no consumer loyalty. It is therefore normal practice to make introductory offers in order to encourage potential customers to test and assess the product and to enable the producer to assess the product's market appeal. Such offers are not in themselves

necessarily anti-competitive. They may, however, become so if they are made on such a scale, or over such a period of time, as to lead to the conclusion that their primary intention is to eliminate competition rather than establish the new product on the market."¹⁴⁷

(iii) Determining costs

If predation means selling below costs a central question concerns the meaning of costs. In the SUNL case the OFT focused upon the marginal cost of producing and distributing the product in question. They defined marginal cost in the undertaking SUNL gave to them as, "... an amount equal to the same proportion of the marginal cost of producing and distributing the [Lanarkshire World] as that advertising space bears to the total advertising space supplied in the [Lanarkshire World] to persons other than SUNL"¹⁴⁸

In negotiating with the OFT parties alleged to be acting in a predatory manner will need to determine the precise meaning of cost. This will necessarily entail the use of accountancy assistance.

During 1984 British Airways (B.A.) filed for approval with the UK and US regulatory authorities a discount fare lowering the applicable price of a round-trip ticket between London and New York to \$378 US from \$597 US, a reduction of 35% on B.A.'s previous winter apex fare. The UK authority, the Civil Aviation Authority, rejected the fare on the basis that, whilst they considered the fare economic, it was considered that in the US a different view might be adopted and a charge of predation raised. There was concern that a small UK airline, Virgin Atlantic, might carry out its threat to challenge the fare in a private treble damages antitrust suit before the US Courts. B.A. accordingly requested the US Department of Justice to issue to it a business review letter stating that it had no intention to proceed against B.A. for predation. B.A. provided the Department of Justice with detailed costs on:

- (i) Flying operation
 - fuel and oil
 - cabin and flight crew variables
 - route facility charges
- (ii) Maintenance (including flight equipment)
- (iii) Rentals: flight equipment
- (iv) Passenger in-flight expense
 - catering variables
 - passenger service charges/security levies
 - load insurance/Airline operating certificate

- (v) Aircraft servicing
- (vi) Traffic servicing

In a business review letter by the Department of Justice to B.A. the former stated:

"Moreover, it is questionable whether, except under the most extreme circumstances, the antitrust laws may appropriately be used to interfere with the unilateral business judgment of an air carrier that a proposed fare reduction will be profitable in the short-run. First, it is extremely difficult to allocate costs and revenues to particular routes, flights, or fare types. Thus, there are any number of valid accounting assumptions that might be made in concluding that a unilateral fare reduction was profit-maximising in the short-run. For example, fare levels that might appear to be below cost on a particular route segment might well cover cost when examined in the context of the carrier's total route system. Second, even if one limits the analysis to a particular route segment, marginal cost in the scheduled airline industry may be extremely low. Once a flight is scheduled to depart, the marginal cost for additional passengers may properly be viewed as quite low. Given a strong incentive to fill empty seats, airlines often have found it makes economic sense to reduce the fare applicable to particular market segments. In recent years, airlines have offered reduced fares based, inter alia, on time of day, day of week, season, advance or late purchase by the passenger or a limited number of seats allocated per plane. Thus it is doubtful that even drastic unilateral fare reductions by an airline can be proven predatory merely by reference to the fare level."¹⁴⁹

The above demonstrates that "cost" is not a precise concept, it will be a matter for negotiation and parties who are complained of will almost certainly need accountancy assistance to determine a cost model they can present to the OFT. In the US parties have traditionally used either average variable costs or marginal costs or incremental costs incurred generating the service provided in exchange for the price.¹⁵⁰

G. EXCESSIVE PRICING¹⁵¹

Excessive pricing is a problem related to market dominance. If a small firm overprices its goods consumers will simply go elsewhere. If a dominant firm overprices its goods consumers may have little choice but to pay the supra-competitive price. Excessive pricing practices are the mirror image of predatory pricing practices (above). Similar problems of

computing cost occurs since, inevitably, excessive prices are viewed in terms of a cost-price differential. However, measuring differentials is not a perfect test of excessiveness. A high differential may be justified by a firm's efficient costs and not by profit maximisation. For example: X has costs of 4 units; Y has costs of 5 units; and, Z has costs of 6 units. The market price is set at 7 units. X in selling at 4 units is making 75% profit but that is not necessarily excessive since the market price of 7 units provides only a reasonable return for X's rivals. The single criticism is that X might not be passing on some of the financial rewards of his efficiency to customers. Indeed, X might be expected to reduce his prices to increase his market share and a failure to do so might be explicable by a price-fixing cartel between X, Y and Z.

Excessive pricing cases are however rare. A firm who charges wildly in excess of costs and thereby maximises profits will be vulnerable to potential competition from new entrants who recognise the possibility of high profits. Thus, to that extent excessive pricing is only likely to be a temporary phenomena. Conversely, if the dominant firm is protected from potential entrants by high entry barriers then it is a more serious problem.¹⁵²

I. EEC law

(i) Meaning of excessive pricing

The European Court has, on a number of occasions, decried excessive pricing. In Sirena v. Eda¹⁵³ they stated,

"Although the price level of a product may not, of itself, necessarily suffice to disclose the abuse of a dominant position ... it may, however, if unjustified by any objective criteria and if it is particularly high, be a determining factor."

The Court in that case did not elucidate on when high prices were justified, what objective factors would suffice, or, what was meant by excessively high prices. In General Motors Continental¹⁵⁴ the Court hinted that excessively high meant a price which was "... excessive in relation to the economic value of the service provided...." In United Brands¹⁵⁵ the Court stated that it would be an abuse to set a price which "... has no reasonable relation to the economic value ..." of the product or service.

The same problems as arise in connection with predation arise here viz., in defining cost. Defining costs is exceptionally difficult. For example at what rate should plant be depreciated, to

what extent is investment in new plant or in R & D attributable, what rate of inflation is to be incorporated etc. It is clear that "excessive" is not a term of art and that a less precise definition of cost will suffice than for predation where notions of cost are central to liability.

(ii) Criteria for recognising excessive prices

The Commission and Court, in the relatively few decided cases, have given some guidelines:

- (a) Miscalculation of cost components: In General Motors Continental the company included in the fee it charged for performing vehicle conformity inspections a component based upon the non-recurring cost of obtaining general approval of the vehicle model. However, the company based this cost component on type approval for General Motors American models. The actual cost of obtaining type approval for the European vehicles in question was much less. Accordingly the company included an unjustified element in its fees. In Hachette¹⁵⁶ the Commission were critical of the company Hachette which was dominant on the French market for the distribution of newspapers, periodicals and books. Hachette included French VAT in its price to wholesalers in Belgium although it was always refunded the French VAT on exports from France.¹⁵⁷ The Commission stated that this cost component was unjustified and hence unfair.

Where a cost component is unwarranted e.g. because it is based on miscalculation or a cost that is not borne a breach of Article 86 seems automatic.

- (b) Existence of differentials between national markets: The Court has held that differentials between Member States may be abusive if unjustified and particularly marked.¹⁵⁸ Thus, where transport or other freight related costs do not justify differences on various markets there will be an implication that on some markets at least excessive prices are being charged.¹⁵⁹
- (c) Existence of differentials between rival suppliers: Where other suppliers with comparable goods or services are charging considerably less then there will be an implication of abusive pricing. However, potential for abuse will only arise where the purchaser has no choice but to take from the suppliers. In General Motors Continental other manufacturing agents charged about half

that charged by General Motors Continental (GMC). However purchasers could not switch from GMC to other suppliers since once they had made the decision to purchase an Opel car they could only, by virtue of Belgian law, obtain vehicle conformity inspections from GMC i.e. having elected to buy Opel they were tied to GMC who enjoyed a statutory monopoly.

- (d) Prices bear no relation to costs: The factors in (a) - (c) above may only be evidence indicating that a price is excessive in relation to assumed costs. Such tests are useful where cost analysis is impossible or unhelpful. Where cost analysis is feasible it should be possible to determine whether a price is excessive. Indeed, it may not always be necessary to know precise costings. In British Leyland¹⁶⁰ the Commission fined the company for charging £150 for the provision of type approval numbers for certain imported vehicles. They sought to justify the price upon the basis of increased overheads. However, the Commission, without seeking to assess accurately British Leyland's overheads made the assumption that the defendants overheads could not possibly be so large as to warrant a price of £150. Thus where there is proof in logic though not in fact of an excessive cost-price differential a presumption of abuse might lie.

II. United Kingdom law

(i) Accounting method

Excessive pricing is subject to the CA 1980 and the FTA 1973. In the past the MMC has on a number of occasions undertaken analysis of a company's profits.¹⁶¹ The test usually adopted is rate of return on capital. The MMC compare the profits of the investigated company with comparable companies. Statistics for the comparison derive from tables compiled by the Department of Trade which incorporate data for approximately 3,000 companies. There appears to be no firm rule on how profits are to be calculated. In some cases the historic cost of the purchase of building plant and equipment minus an amount for depreciation has been used. In other cases the MMC have operated upon a replacement cost basis.¹⁶² and tend to prefer this latter test which enables them to take into account the replacement costs of assets as at the time of investigation. Where technology is rapidly advancing replacement costs may be high and hence replacement cost analysis tends to result in lower

profit conclusions that historical cost analysis.

(ii) Indications of policy

It is not easy to assess how either the MMC or OFT will view profit margins. Where barriers to entry are low the MMC has accepted that the liberty of a dominant firm to overprice its goods or services may be curtailed by the potential threat of new entry.¹⁶³ In other cases the MMC has rejected firms assertions that high profits were needed to enable a firm to undertake the investment in new products necessary if the firm was to be able to diversify away from declining products.¹⁶⁴

The MMC do not generally complain of profit margins under 20%. In their report into Chlordiazepoxide and Diazepam they were highly critical of profits of over 70%.¹⁶⁵ In Industrial and Medical Gases, they criticised profits of only 25% where earned by a dominant concern supplying a low risk, stable demand.¹⁶⁶ Conversely, in Cigarette Filter Rods¹⁶⁷ a 40% margin was considered acceptable where it was perceived as a reward for the high efficiency of the manufacturer.

The MMC have accepted that high initial costs may be justifiable to overcome marketing and planning costs.¹⁶⁸ However, once these have been offset the justification disappears.¹⁶⁹

(iii) Remedies: monitoring of price by OFT

The MMC usually, in an adverse report, recommend price monitoring by the OFT. In Contraceptive Sheaths, following a number of years of having its prices and profits monitored by the OFT, the dominant concern complained that the price controls were hindering its ability to undertake R & D. Accordingly, a second reference was made to the MMC who, in like tone to the first reference, considered that the firm was still dominant on the market and that the need for control remained. They recommended that the firm should not be permitted to increase prices at a rate greater than 1.5 percentage points less than any percentage rise in a special index constructed to reflect the dominant concerns production costs.¹⁷⁰

In Chlordiazepoxide and Diazepam the MMC suggested that the price of certain drugs, namely valium and librium, be reduced by 25% and 40% respectively. This extreme remedy included an element of restitution to the National Health Service who had been the main UK buyer.¹⁷¹

The OFT are careful in monitoring profits. This cannot always be

achieved by supervision of prices. If X reduces prices by 10% this might serve only to stimulate demand and ultimately profits. Indeed the prospects of competing with a lower prices might deter potential competitors from entering the market. Conversely, over zealous price regulation might harm X's ability to perform R & D and diversify. To counter these problems the OFT take costs and profit levels, as well as prices into account in determining their policy. The MMC and OFT, in this respect, are different to the European Commission who are loathe to act the part of regulator.¹⁷²

H. RESALE PRICE MAINTENANCE

In the UK and in the EEC resale price maintenance (rpm) is frowned upon. First, if all dealers or purchasers of a product have to resell it according to specified price dictates then the incentive for the efficient dealer goes unrewarded, he may not cut prices. Ultimately the overall level of retail price remains supra-competitively high. Secondly, since the fixed retail price must be set so as to sustain the least efficient dealer, an inefficient price network is kept in operation, thus discount warehouses and retailers may be hindered in their expansion. Thirdly, although it may be true that where price competition is negated non-price competition (services, promotion, advertising etc.) thrives the effect is to force the buyer to accept the higher level of services. There is a form of tie between the product and the services. Given the choice many consumers might prefer lower prices and fewer pre or post sales services. Fourthly, in terms of consumer benefits, price competition is generally perceived as a more vigorous form of competition than non-price competition.

The main arguments in favour of rpm have developed in the context of what has become known as the "free rider" question. This is examined in Chapter 10 on distribution so that only the bare essentials need be recited here. Where a manufacturer of a luxury or technically complex product supplies dealers with that product the manufacturer will be concerned to ensure that the goods are sold under proper conditions. Indeed the manufacturers reputation (which may be closely linked to a trade mark) may depend upon the proper distribution of the goods. Accordingly, the manufacturer may impose stocking, advertising and pre and post-sales servicing obligations on the

dealer. The cost of providing such services is expensive and will be borne by the customer. The "free-rider" problem arises where a discount or "no-frills retailer" sells the goods at a price below that of the main dealer in the area. Customers exploit the services and qualified staff at the main dealer but actually purchase from the cheap retailer. The effect is that the main dealer is paying the promotion costs of the cheap retailer; the latter takes a "free-ride" on the services provided by the main dealer. Where free-riding occurs the incentive for the main dealer to continue a high level of services diminishes and if services are cut back then the goods may be sold under inadequate conditions. Ultimately the manufacturers reputation is harmed. One way to overcome free riding is to impose rpm since in such circumstances customers will take from retailers providing high levels of services. Whilst the free-rider argument certainly has some validity it has generally been rejected as a justification for rpm.

I. EEC law

(i) Legal context¹⁷³

Attempts by manufacturers to enforce rpm will fall foul of Article 85¹⁷⁴ or Article 86 where a manufacturer is dominant. Often dealers prefer rpm and where this is introduced in conjunction with their supplier, there may exist a concerted practice between all the dealers to comply with the scheme. If the consensus between the dealers is more formal or is buttressed by meetings then the vulnerability to Article 85 increases. The Commission usually concentrate upon the manufacturer-dealer agreement rather than any agreement or concerted practice between the dealers inter se.

The Commission do not differentiate between manufacturers recommendations as to retail price and actual rpm where the effect of the recommendation is to flatten dealer prices into iniformity. If dealers are entitled to fix own prices but must obtain the manufacturers permission to deviate from them, or if a dealer must give prior notice to the manufacturer of any deviation from the latters recommended price, this will be viewed as indirect pressure on the dealer to adhere to the recommended price.¹⁷⁵

(ii) Types of r.p.m.

In VBVB & VBBB v. Commission¹⁷⁶ Advocate General Verloren Van Themaat outlined three broad varieties of rpm scheme. There is little

doubt that all three fall foul of competition rules:

- (a) Individual resale price maintenance: Individual producers or several individual producers make agreements with every dealer or intermediate trade link as to the consumer price of an article.
- (b) Collective, individual resale price maintenance: This entails a collective obligation for all producers in a given sector to individually impose rpm on their dealers.
- (c) Collective resale price maintenance: rpm is effected collectively e.g. through all producers and dealers being bound to each other to uphold resale price maintenance. Usually, rather than achieving this via multilateral agreement, the parties organise a joint secretariat or trade association as an enforcement machinery.¹⁷⁷

(iii) Where confined to one Member State

Retail price maintenance schemes executed by parties in one Member State only may nonetheless infringe Article 85(1). The European Court has stated:

"An agreement extending over the whole territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production."¹⁷⁸

However not every national rpm scheme is unlawful.¹⁷⁹ In VBVB & VBB v. Commission¹⁸⁰ Advocate General Verloren Van Themaat stated in respect of a national collective system of rpm that not every such rpm system would satisfy the test described above. First, rpm schemes usually protect retailers not producers, "... producers remain free under such a system to determine their own sale prices, consumer prices and trade margins."¹⁸¹ Secondly, it was not necessarily the case that national collective rpm which did not affect imported or exported goods resulted in a reinforcement of national compartmentalisation: "In the absence of incidental restrictions on competition such as collective rules on exclusive distributorship, producers from other countries remain entirely free to export to the country in question with or without resale price maintenance and trade, including retail trade, from the country in question remains completely free as respects dealings in such imported products with or without resale price maintenance."¹⁸² This latter point was considered the more important of the two.

(iv) National consensus immaterial to Commission policy

The fact that national laws might tolerate forms of rpm does not mean that EEC law must follow the consensus,

"... national legislative or judicial practices, even on the supposition that they are common to all the Member States, cannot prevail in the application of the competition rules set out in the Treaty. The same reasoning applies with even greater force in relation to practices of private undertakings, even where they are tolerated or approved by the authorities of a Member State."¹⁸³

(v) Resale Price Maintenance not justified as a cure for loss-leader tactics

The European Court has rejected the argument that rpm is a valid cure for loss-leading. This practice entails the very low price sale of goods in order to attract custom. The practice is alleged to be deceptive since it gives incorrect price signals to consumers, the product is probably being subsidised by excessive prices on other goods. Further, it is alleged to harm the manufacturers reputation since consumers may equate low price with low quality. Finally, it may lead to a disruptive price war:

"The fact that a system of resale price maintenance may have the incidental effect of preventing unfair competition of the kind described ... is not, however, a sufficient reason for failing to apply Article 85(1) to a whole sector of the market It is open to undertakings which may have suffered injury as a result of unfair competition to have recourse to legislation on trade practices such as exists in one form or another in all the Member States, which provides remedies against abuses such as those mentioned by the applicants. On the other hand, the fact that such abuses exist cannot in any circumstances justify an infringement of the Community rules on competition."¹⁸⁴

Suppliers withholding supplies from loss-leading dealers are justified in the UK under Section 13 RPA 1976 (see below). However, UK suppliers relying on Section 13 should ensure that their conduct does not affect inter-state trade so as to activate EEC rules.

(vi) Resale price maintenance: When exemptable under Article 85(3)

It appears to be the case that rpm may be exemptable under Article 85(3) in exceptional cases where price competition is relatively unimportant to the consumer and where non-price rivalry is central. In Metro v. Commission¹⁸⁵ a third party contested a Commission decision

approving under Article 85(3) an rpm scheme. The Court affirmed the Commission's competence to approve rpm. Resale price maintenance was acceptable in markets for products where marketing and pre and post-sales services were relatively more important than price. In these markets rpm was permissible if it facilitated competition between dealers in services. The rpm thus cemented a switch in intra-brand competition from price to services. Where inter-brand rivalry remained high (i.e. rivalry between different brands) then competition from other manufacturers would ensure that prices remained competitive. Where price is the central ingredient of competition (and this will invariably be the case) rpm will not obtain exemption.¹⁸⁶

II. United Kingdom law¹⁸⁷

(i) OFT practice

Resale price maintenance in the UK is governed by the Resale Prices Act 1976 (RPA 1976 hereafter). This Act has been singularly successful in eliminating rpm. The OFT however receive a significant number of complaints each year (between 20 and 30 on average) often from dealers who consider that the refusal of their supplier to maintain normal trading with them was due to price cutting on their behalf. On investigation the OFT usually discover that under 5% of all complaints warrant OFT action.¹⁸⁸ The OFT deal with violations of the Act by seeking an undertaking from the infringing party which cures the violation. However, more usually cases are dealt with by the OFT suggesting to a supplier that they amend the wording of sales or promotional documents so as to avoid misinterpretation by dealers or the public.

(ii) Collective resale price maintenance¹⁸⁹

The following points may be noted

- (a) Supplier cartels: It is unlawful (though not a criminal offence) for two or more suppliers carrying on business in the United Kingdom as goods suppliers to make or perform any agreement under which they agree:
- to refuse supplies to a dealer who is reselling, or has resold, goods in breach of the suppliers price conditions;
 - to refuse supplies to dealers who deviate from suppliers price conditions other than on discriminatory terms;

- to supply to other suppliers (e.g. wholesalers) who agree to supply dealers on the same basis as the two situations above.¹⁹⁰

Moreover it is unlawful for two or more suppliers to agree to recover or seek to enforce penalties from defaulting dealers.¹⁹¹

- (b) Dealer Cartels: It is unlawful for dealers to agree to withhold orders for supplies from suppliers who continue to supply price cutters.¹⁹²
- (c) Trade Associations: The prohibitions on suppliers and dealers above apply equally to trade associations.¹⁹³
- (d) Registrability under the RTPA 1976: Where an association, for example a joint purchasing agency, recommends or suggests to members selling prices for special promotions or "own-brands" this is registrable under Section 6(1)(b) RTPA 1976. Though such recommendations may be exemptable under Section 21(2) RTPA 1976. See Chapter 12 Section D.

(iii) Individual Resale Price Maintenance

Any term or condition in a contract between a supplier and a dealer which provides for minimum rpm is void.¹⁹⁴ The same applies to a contract between a supplier and a wholesaler requiring the latter to incorporate rpm clauses in contracts with dealers. It is essential to note that Section 9 applies only to minimum prices. It remains legal for suppliers to fix maximum prices and/or to recommend resale prices.¹⁹⁵ Though any pressure imposed on dealers to comply with a recommendation is unlawful.

It is unlawful for a supplier or trade association or other person representing a supplier to: include a term that is void in a contract; require, as a condition of supplying a dealer, the inclusion of any clause which seeks rpm; or, notify to dealers (or publish) a price in relation to any goods which is to be understood as a minimum price for resale.¹⁹⁶

The prohibitions above extend to patented goods.¹⁹⁷ However, it is clear that a price clause in a patent license requiring the licensee to maintain a certain price is not subject to the Act.¹⁹⁸ The patent holder is prohibited however from granting a restricted sales license to purchasers who have obtained the goods directly or indirectly through the patent holder or through the licensee and thereby maintain rpm. This would be relevant for technically complex consumer goods which may incorporate parts which are patented e.g. cars, stereos, radios, dishwashers etc.

(iv) Unlawful withholding of supplies to dealers who cut price

It is unlawful to "withhold supplies" to price cutting dealers on the basis that: (a) the dealer has undercut the suppliers stipulated price; (b) the dealer has supplied contract goods to a third party who has undercut the suppliers stipulated price; (c) the dealer is likely if the goods are supplied to him to undercut the suppliers stipulated price; (d) the dealer is likely if the goods are supplied to him to supply those goods to a third party who would be likely to undercut the suppliers stipulated price.¹⁹⁹ Where these prohibitions apply to a supplier it is equally unlawful for that supplier to organise for any other supplier to refuse to supply the dealers.²⁰⁰ An agreement between suppliers to this effect is, in any event, prohibited by Section 1 of the Act. Furthermore, the second supplier would likewise be prohibited from refusing to supply in the same way as is the first supplier.

Section 12 RPA 1976 explains the meaning of "withhold supplies". A supplier is to be treated as "withholding supplies" from a dealer: (a) if he refuses to meet the dealers orders; (b) if he refuses to supply a dealer other than at prices or on terms or conditions as to credit and discounts etc. which are significantly less favourable than those at or on which he normally supplies such goods to other similar dealers; (c) he supplies the dealer but he significantly discriminates against the dealer when compared to other such dealers in terms of times or methods of delivery or other matters arising from performance of the contract.

In practice it may prove difficult for a dealer to prove that a supplier has significantly discriminated against him. First, the term significantly used in Section 12 appears to exclude discrimination against a price cutter which is of a minimal nature, it will be a question of fact in each case whether the discrimination is "significant" or not. Secondly, dealers can only complain of discrimination that differentiates him from other comparable dealers. Section 12(1) speaks of "other dealers carrying on business in similar circumstances". How does one determine whether dealers are in similar circumstances? Does "circumstances" refer to geographical location, volume of turnover, profit margins, willingness to provide pre and post-sales services, advertising space and stockholding capacity, etc?²⁰¹ It would seem that suppliers may relatively easily be able to justify discriminating

against a price-cutter on the grounds that the dealer was not in similar circumstances to another dealer. The test here is probably an objective one i.e. not whether the supplier personally considers dealers to be in similar circumstances, but, whether a hypothetical reasonable supplier would so consider them to be

(v) Lawful withholding of supplies to dealers who cut price

Suppliers may refuse to supply price cutters if, in addition to the price cutting there are additional grounds which standing alone would have led the supplier to withhold supplies.²⁰² On the precise wording of the statute the test is subjective i.e. did the supplier actually have reasons other than the price cutting of the dealer to withhold supplies? There is nothing in the Act to say that these reasons must be objective or reasonable. However unreasonable grounds may operate to throw doubt upon the genuineness of the suppliers assertion that the ground was the predominant reason for withholding supplies. It appears, therefore, that a supplier may refuse supplies to a multiple retailer or discounter who is providing inadequate pre and post-sales services to protect the manufacturers reputation. Though, such a refusal to supply may be anti-competitive under the CA 1980 and the OFT will accordingly assess the economic effect of any refusal to supply irrespective of the RPA 1976.²⁰³ Indeed, the Act embodies a presumption that a withholding of supplies is unlawful where: (a) up until the time the supplier withheld supplies the supplier was doing business with the dealer or with other similar dealers; and (b) the dealer, to the suppliers knowledge, had within the previous six months cut prices or supplied another dealer who had cut prices. Note that this is only a presumption, it may be rebutted by the supplier showing that there was another reason for the withholding of supplies.²⁰⁴ It is clear that the presumption will operate in most cases. The presumption does not operate where the proof that supplies were withheld consists only of evidence of requirements imposed by the supplier in respect of the time or form of payment for goods supplied.²⁰⁵

(vi) Resale Price Maintenance lawful to prevent loss-leading

As noted above the European Court has refused to allow rpm as a cure for loss-leading. The opposit applies in the UK, Section 13 RPA 1976 states that it is not unlawful for a supplier to withhold supplies (or to organise for another supplier to withhold supplies) from a dealer

where the supplier has "reasonable cause" to believe that within the past 12 months the dealer (or any other dealer who is supplied by the dealer) has been using the contract goods as loss-leaders.

A loss-leader sale is defined in Section 12(2) as a sale, "... not for the purpose of making a profit on the sale of those goods, but for the purpose of attracting to the establishment at which the goods are sold customers likely to purchase other goods or otherwise for the purpose of advertising the business of the dealer."²⁰⁶ Though the point is not absolutely clear it seems that a loss-leader sale is not necessarily a sale below cost, it can be a sale incorporating a significantly smaller mark-up than that envisaged by the suppliers recommended price.²⁰⁷

The test here is objective, it is not whether the supplier had cause to believe that the dealer was loss-leading, it is whether that supplier must have reasonable grounds for believing that the dealer loss-led the goods either: (i) to attract customers who might purchase other goods; and/or (ii) to generally advertise the dealers business.

In J.J.B. (Sports) Ltd. v. Milbro Sports Ltd.,²⁰⁸ a dealer sought an interlocutory injunction to restrain the supplier from wrongfully withholding supplies. The Court accepted the suppliers defence that the refusal to supply was in response to the dealers loss-leading. In Judgment the Court noted that the plaintiffs statement of claim was premised entirely upon the allegedly past unlawful withholding of supplies and did not refer to threatened refusals to supply in the future. Thus, a defendant seeking an injunction should request a Court order to deal with both past infringements and any future refusals to supply.

Under Section 13(3) RPA 1976 the following are not loss-leaders: (i) genuine seasonal or clearance sales of goods not purchased for such purposes; (ii) sales made with the consent of the manufacturer; and (iii), sales of goods made to the design of a supplier, or to the order or bearing the trade mark of a supplier, made with the consent of that supplier.

(vii) Supplier practices outside the scope of the Act²⁰⁹

A number of practices though perhaps economically undesirable have been generally accepted as falling outside of the RPA 1976.

However, such practices may be reviewed under the CA 1980 if they amount to a course of conduct i.e. have a repetitive or non-isolated incidence.

- (a) Credit Control - 'Minimum Advertised prices': The practice turns upon the supplier practice of providing credit to dealers to finance their stocks. Suppliers warn dealers that if they undercut an advertised price or if they advertise at below the suppliers recommended price then the supplier will have to reconsider the creditworthiness of the particular dealer. The low price charged by the dealer will give insufficient profit to make the dealer viable and obviously suppliers must protect against bad debts. The OFT have received complaints of supplier behaviour of this nature, especially in respect of expensive camera equipment, but have been unable to provide a remedy. Suppliers can justify this behaviour under Section 12(2) RPA 1976 on the ground not that the dealer shaved prices but that the dealer was not credit-worthy. It will be recalled that withholding supplies under Section 12(2) is legal where the motive is not related to the price cutting of the dealer. .
- (b) Guarantees: Many suppliers give guarantees to the ultimate consumer of their goods but provide that the guarantee is only operative if the goods are sold at the recommended retail price. This is not a condition imposed on the dealer so is not embraced by the Act. It does affect the dealer in that if he undercuts the suppliers recommended price he cannot transfer the guarantee to the customer. Clearly, there exists in this an incentive for the dealer to maintain the price and pass over the guarantee since this affords the dealer greater security against contractual responsibility for defective goods. Often the guarantee is more valuable to dealer than customer.
- (c) "Dealer Noise" - complaints by dealers: If a major dealer threatens to change his supplier unless that supplier refuses to deal with a smaller dealer who is causing trouble by price cutting then the supplier may be able to justify withholding supplies from the smaller dealer on the basis that failure will entail the loss of a more important customer. The greater the volume of "dealer noise" the more compelling becomes this argument. Where dealers, in concert, agree to pressurise a supplier this is unlawful under Section 2 RPA 1976.²¹⁰

- (d) Product reputation: Suppliers who employ selective distribution techniques may decline to supply price cutters on the basis that this will effect the reputation of the goods albeit that the supplier does not otherwise object to his goods being cut priced. Suppliers might contend that if a dealer were to cut prices and commence a price war then other dealers would also have to cut prices; this would necessarily mean that pre and post-sales services would have to be cut back and this in turn could mean that the goods were sold under conditions harmful to the suppliers reputation.²¹¹

It should finally be stressed that refusals to deal based upon these considerations though outside the scope of the RPA 1976 may be subject to the CA 1980. Nonetheless, under that Act they are not automatically unlawful and, in any event, will only encounter legal problems when (and if) the OFT decide to investigate. Dealers refused supplies in the above ways may of course complain to the OFT under the RPA 1976.

(viii) Obtaining Exemption via the Restrictive Practices Court

For all practical purposes the right accorded by the Act to suppliers or their trade associations to apply to the RPC for exemption for their rpm schemes is an irrelevance. Two cases have, it is admitted, succeeded by this method to obtain exemption. However both cases have received severe criticism and all other attempts have failed. The RPC may exempt goods where satisfied that loss of RPM would entail one or more of five mal-consequences outlined in the Act. These are:

- (a) substantial decline in quality or variety of goods available on the market; (b) a substantial decline in the numbers of retail outlets; (c) long-term increases in prices; (d) danger to health as a result of misuse by the consuming public; and (e) the cessation or substantial reduction in necessary post-sales services to the consuming public. Moreover, the Court must be satisfied that the detriment from rpm is less than the detriment from loss of rpm.

Originally over 500 rpm schemes were registered pending a hearing before the RPC. Only four reached the Court. Confectionary suppliers²¹² and footwear suppliers²¹³ failed. Medicaments succeeded despite opposition from the Government.²¹⁴ The Net Book Agreement succeeded with the assent of the Government.²¹⁵

As time progresses it will presumably be increasingly difficult to

justify exemption before the Court. First, the Court will have at its disposal statistical and economic evidence over a long period of time about the effects of no rpm on the market so that mere hypothesis about what the market will be like without rpm will not suffice; secondly, given that the legislation is now long-standing²¹⁶ it might be asked why suddenly there should evolve a pressing need for rpm. Conceivably the issue might arise in respect of a new product or technological development.

Where a supplier has been allowed to enforce rpm he may employ Section 26 RPA 1976. This entitles the supplier to apply to the Court for an injunction restraining any dealer who is not a party to the contract with the supplier but who obtains the goods with notice of the rpm condition, from selling the goods in breach of the condition.²¹⁷ Section 26 only applies to dealers who are to resell the goods, it does not apply to consumers. The Section further applies to any other resale price condition that is lawfully a maximum price condition.²¹⁸

It will be appreciated that Section 26 is a statutory circumvention to the ordinary contract rule of privity whereby a supplier cannot enforce contractual terms against persons not party to the contract.

(ix) Enforcement by the OFT: Assurances

Section 25(2) entitles the Crown to commence proceedings for an injunction or other relief against a party breaching the Act.²¹⁹ Section 23(3) gives a remedy to a private party who has been harmed by breach of the Act to sue the infringer for damages by way of the tort of breach of a statutory duty.²²⁰ In practice both such remedies are all but irrelevant. In reality complaints are made by aggrieved parties to the OFT who investigate and if (in the rare event) the complaint proves justified, pressurise the infringing party into compliance. Usually, suppliers are encouraged to recommence supplies to a price cutting dealer. Where the OFT are unconvinced of the willingness to comply of the supplier they will seek an informal assurance from that party that the Act will, in future, be complied with. These assurances generally contain up to four negative elements and two positive elements:

- (a) Negative elements:²²¹ The OFT, depending on circumstances, seek undertaking from the parties whereby they will not:
- "notify to dealers or otherwise publish of or in relation to any goods a price stated or calculated to be understood as the

- minimum price which may be charged on the resale of those goods in the United Kingdom";
- "require as a condition of supplying goods to any dealer the inclusion of a term or condition or the giving of an undertaking establishing or providing for the establishment of a minimum price to be charged on the resale of those goods";
 - "withhold supplies from a dealer on the grounds that the dealer has sold or is likely to sell the goods at less than minimum prices";
 - "discriminate in any way against a dealer for the reason that such dealer sells, advertises or displays for sale its goods at prices below any price which it may communicate to a dealer in relation to the sale, advertisement or display for sale of its goods."
- (b) Positive requirements: Occasionally the OFT includes the following clauses in an undertaking to be given by a supplier:
- "with a view to ensuring that the relevant provisions of the Resale Prices Act 1976 are understood and observed throughout the Company's operation in the United Kingdom, it will bring the provisions of this assurance to the attention of all its employees concerned with the marketing, promotion or sale of its goods";²²²
 - "the Company shall circulate to all its dealers a statement conveying the substance of this assurance and advising them that they are free to sell, advertise and display for sale its goods at whatever price they may choose to do so".²²³

I. EQUALISATION OF RECEIPTS SCHEMES

Equalisation schemes or profit pooling systems as they are sometimes termed exert an indirect effect upon prices but are nonetheless caught within competition rules. The essentials of an equalisation scheme were evident in Cimbel.²²⁴ The parties sold cement on both the domestic (Belgium) and export markets. Given transport costs for such a heavy, low value per unit, product export profits were lower than domestic profits. The equalisation scheme sought to reduce the financial penalty suffered by exporters vis-a-vis domestic sellers. The trade association in question - Cimbel - collected

the receipts of all transactions and made the necessary calculations to arrive at a fictitious average price for domestic sales and exports combined. Suppliers then compensated those suppliers whose lower than average profits were due to a concentrating of effort on export sales. The amount paid would be by reference to the fictitious average price. The parties claimed that this enabled them to increase competition on foreign markets (in the absence of the agreement exports on existing scales would be impossible). Further, that the scheme enabled them to employ maximum capacity thereby realising scale economies. An important feature of the scheme was that prices on the domestic market were fixed at supra-competitive levels.

I. EEC Law

(i) Nature of Scheme

In Cimbel (supra) the Commission objected to an equalisation scheme on the following grounds:

- (i) it operated as a private aid scheme to exporters giving them an artificial advantage on the export market. Manufacturers in other Member States were hence competing not only with the exporter but, de facto, with all domestic producers in that country also;
- (ii) the scheme allowed producers in the scheme to underservedly offload surplus capacity on export markets irrespective of the efficiency or ability of each individual exporter;
- (iii) the scheme was financed by excessive receipts obtained on the domestic market. Without the equalisation of receipts and compulsory prices these receipts would necessarily have been lower.²²⁵

The Commission also view such schemes unfavourably for the 'smothering' effect they have on prices. Thus invariably loss leader selling or sales prices below a certain minimum are excluded from the equalisation process thereby discouraging the maverick quotations which characterise competitive pricing.²²⁶ It is still an unlawful restraint on competition if the equalisation of profits is confined to transactions with non-Member States.²²⁷

(ii) The Defense of Economic Necessity

In Cimbel the parties argued that the scheme prevented the industry from economic ruin. Investment costs for cement works were three or four times the annual turnover and hence to preserve outlets

during periods of intense competition cement producers had to sell at prices which guaranteed a profit otherwise they would be forced to gradually consume the substance of their businesses (i.e. investment costs would exceed return and eat away at reserves). The Commission refused to accept that the cartel was necessary to continued existence. They noted that it had not led to improvements in production or distribution such as would compensate for the restrictive effects of the cartel. However, they did imply that in appropriate circumstances a defense of economic necessity might be feasible: "The purely potential danger of ruinous competition, regarded as a theoretical and uncertain future event, cannot justify at present the elimination of competition between the parties with regard to price".²²⁸ Arguably this implies that price restrictions might be justified where an acute recession actually threatens

II. United Kingdom Law

(i) Whether registrable

It is clear that profit pooling is registrable under either Section 6(1)(d) RTPA 1976 as concerning restrictions on the quantities to be supplied, or, under Section 6(4) RTPA 1976 which expressly provides that schemes with mechanisms such as are used in profit pooling concern restrictions in respect of the quantities of goods to be produced or supplied. In Linoleum Manufacturers Association Agreement²²⁹ Ungood-Thomas J. thus explained that the right of a party to a scheme to receive payment, "... depends upon the relationship of the quantities of goods supplied by him to the total quantities of goods supplied by all members. For each member there is a break-even point, namely a point at which he is neither paid nor pays. If he supplies a quantity of linoleum exceeding that proportion of the total linoleum supplied by all members which determines his break-even point, then and then only is he obliged to pay".

(ii) Assessment

There are three situations requiring examination under UK law:
(1) where the parties to the equalisation agreement are all situated in the UK but the aim of the agreement is to boost export sales to the EEC; (2) as above but where the aim of the agreement is to boost export sales to non-EEC States; (3) where the parties are all situate

in the UK and the equalisation is in respect of receipts earned on the domestic market only. These options will be considered in turn.

First, where the parties are all situated in the UK but use the scheme to boost EEC sales this will fall foul of Article 85(1) EEC. A parallel case was Cimbel where although the price-fixing agreement was only in respect of the Belgian market the anticompetitive effects were felt elsewhere in the EEC. A decision of the Commission prohibiting such an agreement or imposing a fine in respect of it will not prevent similar prohibitive or punitive action being taken at national level. Enforcement at the national level would be in response to anti-competitive consequences felt on the home market whereas community enforcement responds to anti-competitive consequence on trade between Member States. It should be noted however that national law cannot exempt such an agreement if it has been prohibited under Community law since Community law always takes precedence.²³⁰ Accordingly, this type of equalisation scheme stands little or no chance of success.

Secondly, national firms party to an equalisation scheme export outside the EEC. In Agreement of Papeteries Bollore S.A. and Branstein Freres S.A.²³¹ an equalisation scheme operated by undertakings in one Member State with the aim of supporting non-EEC exports was still prohibited under Article 85(1). The reasons for this are unclear however in explaining the Commission's strict approach it may be relevant that the scheme was only one of a bundle of other restrictions objected to by the Commission which had to be terminated before the overall export agreement could receive exemption under Article 85(3) EEC. It is arguable that an equalisation scheme operating independently of other restrictions which boosts non-EEC exports might be legitimate under EEC law and hence potentially legitimate under UK law. No harmful effect upon intra-community trade would occur where imports from other EEC States are not hindered. Indeed, a price-fixing agreement in the UK (as a constituent part of the equalisation scheme) resulting in supra-competitive prices might encourage domestic importers and foreign EEC exporters to market foreign products in the UK and undercut the high domestic price. However, in view of the current EEC approach business should exercise caution. Even were EEC exemption to be available the fact that equalisation schemes invariably entail domestic price-fixing would suggest that a strict approach would prevail in the UK. It might be argued in this context that an equalisation scheme

boosting non-EEC exports would fall under Section 10(1)(f) RTPA 1976 - the export earnings gateway (for detailed analysis see Chapter 5).

This gives as a ground for exempting restrictions,

"That, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume of earnings of the export business which is substantial either in relation to the whole export business in the United Kingdom or in relation to the whole business (including export business) of the said trade or industry."

Whilst case law on this section need not be repeated it is pertinent to note that of seven cases pleaded on this section only one has succeeded.²³² Moreover, no case has ever employed this provision as possible justification for an equalisation scheme. The main stumbling block in the failed cases has always been in persuading the Restrictive Practices Court that the export advantages outweigh the domestic price-fixing. Moreover, to stand a chance under this provision the domestic fixed price would have to be "reasonable" whereas in the EEC cases the domestic fixed price has always been supra-competitive, indeed it must be high in order to be able to compensate for low export earnings. Equalisation schemes, though effecting exports, are not pure export agreements which are free from antitrust restraints under UK law.²³³ Equalisation agreements are more properly viewed as domestic agreements with export consequences.

Thirdly, a purely national scheme involving no element of export aid would stand minimal chance of success since it would effectively be a method of smothering price competition. If a firm's earnings will be harmed rather than enhanced by an expansion of sales (i.e. there will be no compensating increase in profits from increased volume of trade) then the incentive to derogate from a common price is reduced. In the Linoleum case noted above members of the association paid a levy to a central pool calculated upon the basis of average manufacturing cost multiplied by the quantity sold to specified types of customer divided by two. The agreement provided that the pool proceeds would be distributed between the parties in predetermined, fixed proportions. However the only sum payable to a member was the difference between his levy and his share of the pool. Thus, if his levy exceeded his pool share he had to pay the difference to the pool; if his levy was less than his pool share he was paid the difference by the pool. Whether a member's levy exceeded or fell below his share of the pool depended

upon the relationship between the quantities of products sold by him to the total quantities of relevant products supplied by all the members. Such a scheme is inappropriate to Section 21(2) treatment; it stands but minimal chance of success before the RPC. Such agreements tend to lead to fixed prices and stable market shares.

J. DELIVERED PRICING (BASE OR PARITY POINT PRICING)

I. Economic framework

(i) Nature of problem

These systems have caused problems for antitrust authorities with certain forms of the system unlawful and others almost certainly legitimate. The major problem lies in identifying legitimate schemes and differentiating them from unlawful schemes. In industry these schemes are known variously as: delivered price systems; base point pricing; multiple base point pricing; parity point pricing; freight equalisation systems; Franco-Zone pricing systems; and, spatial pricing systems. Whatever the title of the system its basic function is to determine how freight costs are absorbed into ultimate price. A number of freight pricing methods exist. One - so called "postage stamp" pricing - involves sellers charging a uniform delivered price to every buyer irrespective of distance (and hence true transport costs) from the production source. Alternatively, buyers in particular zones perhaps delineated by State may be charged identical freight costs. In each case the producer absorbs higher freight costs on shipment to distant customers than on shipments to customers nearer its plant. The producer therefore discriminates in favour of distant customers and against local customers. Postage stamp pricing is used more commonly for commodities whose value is high relative to transport costs. In the legally ideal world however - which does apply in the case of some bulky, low-value commodities - a system of uniform ex-mill pricing is adopted: Producers announce a mill price with purchasers bearing their own freight costs. If delivery by the producer is preferred only those freight charges actually incurred are added to the price. This is the 'ideal' system because it involves no geographical price discrimination since purchase price relates directly to freight costs whilst the seller receives a uniform mill net price after outward freight charges have been covered.²³⁴

To demonstrate some of the problems a hypothetical multiple base-point system is noted below. Under this system each major production centre becomes a basing point and producers located on that point effectively charge realistic prices. Firms who are distant from the base point may, however, find it convenient to quote delivered prices incorporating freight costs calculated from the base point rather than from its own works. Though, firms on or around a base point might invade an area served by another base point centre of production and compete in that market by absorbing their own freight costs.

Example I: A base point centre of production is at X. A supplier is located at point Y which is 400 miles due south of X. A purchaser is located at point Z which is 400 miles due north of X. If the supplier wants to sell to the purchaser he will charge freight only from base point X to point Z. (i.e. for only 400 miles rather than for 800 miles). In other words the purchaser pays freight as if the supplier were located at base point X. In this way the supplier can compete with other suppliers actually located on X.

Example II: As above but the purchaser is located only 20 miles away from the supplier at point Y. However he is charged freight costs as if he were located at base point X. The supplier, in this case earns extra profits based upon freight costs that have not been incurred, these profits are described as "phantom freight costs" profits.

(ii) Competition Law Analysis and Objections

- (a) Base point pricing has, in the United States at least, often been equated with collusion.²³⁵ This is theoretically incorrect as the European Commission has recognised: "The question that arises in the scrutiny of individual cases is whether parallel conduct by several firms in the same industry is based on overt or covert collusion between them or inspired by a dominant firms strategy."²³⁶ Thus, if a smaller supplier away from a major production centre feels that he has to base his freight costs on that major centre in order to be able to compete this is simply a response to a competitive situation and not evidence of agreement. Indeed, if a small firm charged only small freight costs to a customer close by to him thereby undercutting the large suppliers at the centre the latter could retaliate by loss-leader pricing to the small firms customers until that small firm was put out of business. Accordingly, the

earning of "phampton freight costs" profits is not conclusive evidence of violation. Moreover such profits might arguably be viewed as a quid pro quo or compensation for freight costs absorbed by the supplier in supplies made long distance.²³⁷

(b) Base point pricing is objectionable because of the following economic consequences:

- It tends to underpin price agreements aimed at maintaining a geographical structure of delivered prices fixed to maximise the supplier group's profits.
- Delivered prices penalise buyers close to production centres and subsidise those further away. This distorts the competitive relationship between customers punishing firms who have located close to production centres who in reality deserve a price advantage.
- Systems employing a single or only a very few base points harm consumers located at centres of production which have not been selected as base points. Furthermore such a system can affect regional development by leading to the geographical concentration of buyers around the dominant base points.
- Customers cannot buy ex-works or ex-warehouse nor see to transport themselves. The system thus unjustifiably ties sale of the product to use of the suppliers distribution network even though the purchaser may be able to provide his own more efficient and economical transport.
- Producers using the system refrain from using their location as an argument in their favour when seeking new customers.
- Compliance with a delivered price published by a majority of firms in a given trade is a rigidity which can seriously disrupt competition.
- Where reference areas coincide with the borders of the Members States of the EEC then the system can harm the unity of the market by creating and supporting differential price zones.²³⁸

II. EEC Law

The Commission has stated:

"For obvious reasons, what is known as the basing points system, by removing all uncertainty as to the manner of calculating delivered prices, makes for perfect price transparency. The fact that competing firms systematically align their prices on the base prices plus the freight by the traditional supplier to the relevant area or country could well point to a price-fixing agreement."²³⁹

However, the Commission has rejected the argument advanced by some that base point pricing is always unlawful. As explained earlier there should exist a defense for the smaller supplier located away from a base point who adopts that base point for freight charge purposes in order to prevent predation or retaliation by large suppliers located on the point. Hence the fact that the smaller supplier may earn "phampton freight cost" profits is not conclusive. The question arises how is a genuine situation distinguished from a collusive one. The Commission has not given guidance on this other than to state that antitrust problems are exacerbated where the commodity is of low unit value.²⁴⁰ From American cases which have examined the problem the following features have emerged as indications of collusion: (1) existence of a central trade association disseminating freight charges for adoption by suppliers to various zones; (2) disciplinary action by the trade association (boycotts; warning letters; fines etc.) against suppliers not adhering to the published freight costs; (3) loss leader or otherwise predatory pricing by large firms against small firms who do not adhere to published freight costs; (4) opposition to carriage by transportation means other than those approved by a trade association and disciplinary reactions to those using different transport means.²⁴¹

An overview of cases suggests a fairly strict approach. Thus in European Glass Manufacturers²⁴² the Commission stated: "This system ... has the object of nullifying any competitive advantage which a producer ... might gain from the proximity to his customers. It favours distant customers at the expense of those who are near; as the price is identical for both, the nearer customer pays for costs of delivery higher than those actually incurred by the seller, while the distant customer benefits from a discount on the actual freight costs. The system being of exclusive application, the sale of the products is automatically tied to the user accepting their delivery to his location, a supplementary obligation which has no necessary connection with the sale of the goods, since users of glass containers most often have their own means of transport."²⁴³ Consequently competition between producers inter se and purchasers inter se was distorted.

Where joint selling agencies have also employed joint distribution networks whereby a number of firms use a single distribution scheme thereby incurring identical freight costs the Commission, again, has been critical.²⁴⁴ Such a common freight network might be justified only if the joint selling agency itself gained exemption under Article 85(3) EEC. The Commission has accepted that a nexus between joint agency and joint distribution may exist. Thus in Central Stikstof Verkoopkantoor the Commission commented that

a freight equalisation system operated by fertiliser producers was "... in fact merely a logical consequence of the joint sale of their products."²⁴⁵

It is worth recalling that suppliers who adopt base points away from their plant may be acting lawfully if they can prove that this is simply a response to market circumstances and not evidence of collusion.

There is nothing to prevent individual firms from operating delivered pricing systems so long as there is sufficient competition to ensure that, despite the equalising effect on the freight component, prices remain competitive and reasonable and alternative supply sources exist. An individual firm in a dominant position employing such a system might be susceptible to challenge under Article 86 EEC from purchasers close by who could claim that the dominant concern was price discriminating against them vis-a-vis more distant customers. Dominant suppliers who pressurise smaller suppliers in the area to use them as a base point will probably be infringing Article 86 EEC. Where a dominant firm does employ base point pricing they might be well advised to give customers the option of arranging their own deliveries.

III. United Kingdom Law

The economic arguments discussed above would apply equally within the framework of United Kingdom law. In Cement Makers' Federation Agreement,²⁴⁶ however, a multiple base point pricing system operated by a trade association was accepted by the RPC. The scheme is interesting since it did make provision for increasing freight costs to be taken into account. The Federation fixed cement prices, these had as their basis a "base price". This was the price to be paid within a five-mile radius of the works or group of works (the basing point) where the cement was manufactured. Concentric circles of radii increasing by successive five miles delimited zones within which the price was increased by specific amounts as cement was delivered further away from the works. The price increases progressively diminished the further away cement was delivered, thus there was a subsidy granted to distant customers. The price structure encouraged suppliers to sell close to home and to locate as near as possible to demand. The element of discrimination inherent in many systems was less pronounced here since the subsidy granted to distant customers was only a partial one; freight costs were staggered but not averaged. Hence local customers could gain a cost advantage over distant rivals. The judgment also reveals that the market was dominated by a market leader who supplied most of the distant customers thus (somewhat philanthropically) bearing most of the subsidy costs itself. Furthermore, the Court seems to have considered that if a

price war broke out the other firms would have little chance against the market leader. The Court thus highlighted a number of features which they considered made the system a reasonable one: the industry had operated on a modest profit margin and there were strong indications that the average rate of profit on capital employed was appreciably lower than that prevalent elsewhere in industry; the industry had operated efficiently expanding capacity in proper relationship to increases in demand and changes in geographical demand; the fixed prices were reasonable giving firms a return on capital of under 10%. In the risky free (unrestricted) market it was considered that firms would require a minimum of 15% return on investment. Consequently, the Restrictive Practices Court accepted that the multiple base point pricing system gave the parties the security they required to fix prices at a low-level.

As with other cases that have successfully passed through the Restrictive Practices Court exceptional facts and market circumstances prevailed. Nonetheless, the case demonstrates that a moderated system coupled to very reasonable prices may be legal. Where the practice has been examined by the Monopolies and Mergers Commission it has invariably been condemned and a wise businessman would learn from this that jointly operated and agreed systems are unlikely to receive official blessing.²⁴⁷ Agreements to operate base point pricing will not be suitable for Section 21(2) treatment.

K. COST CALCULATION MODELS

I. Nature of Model

Many firms set prices inefficiently through ignorance of their cost structure. Hence a relatively common practice of trade associations therefore is the dissemination of statistical and economic data relating to the construction of cost calculation models. The process of "educating" members as to the proper methods of a price calculation can be broken down into at least six stages. It should be stressed that not all stages necessarily reflect legal behaviour.

Stage one: The association provides standard forms for cost analysis. This helps eliminate "guesswork" prices.

Stage two: The association informs members of the correct method of calculating costs. Thus guidance for example on figuring charges for raw materials, depreciation and distribution of overheads might be circulated. This further assists members in making accurate cost analysis.

Stage three: The association publishes the aggregate cost for all components

of production throughout the manufacturing process. The disseminated data will relate not to actual costs but to a set of costs for the fictitious average firm.

Stage four: The association may recommend a universal "efficient" profit margin. This does not imply price-fixing since low cost producers may still underprice high cost producers. The profit margin may be determined by such factors as comparative margins in other analogous industries, minimum amount of profit required to give an adequate return on investment etc.

Stage five: The association (as an alternative to stage 4) introduces an allowance for profit into a figure for average cost that is disseminated to members. Effectively the average cost that now exists represents a recommended selling price. Whereas the aggregated cost data described in stage three might be useful to members in assessing critically their cost structures, the incorporation of a profit margin tends to suggest an attempt to harmonise prices. Indeed, where covert price fixing is aimed at under the cover of a campaign to "educate members" the association will probably not recommend a profit margin in stage four. Where the use of a stage four profit margin is advocated openly it is unlikely that collusion is intended. Where a profit margin is artificially incorporated into the notion of average cost a conclusion of collusion is not unreasonable.

Stage six: The association enforces adherence to the "average cost" (stage five) by editorial commentaries in trade journals, resolutions passed at association meetings and conferences, lectures and seminars on "accountancy" and direct correspondence between association secretariat and members. Of course for the unsophisticated association fines, expulsions, boycotts and black-listings might be more immediate means of ensuring adherence.

Not all industries require this form of assistance, many firms employ their own accountants and view their cost calculation systems as trade secrets. Knowledge of own costs has been made more common by tax laws requiring more detailed accounting and by negotiations for government or other large contracts which must be based on accurate cost information. Though cost calculation modelling does still exist some industries have turned to operating ratio reports (discussed in Chapter 9) as means of comparing and analysing industry costs.

II. EEC Law

(i) Under Article 85(1) EEC

In Community v. Bundesverband Deutscher Stahlhandel ²⁴⁸ an association of steel stockholders with over eleven hundred members representing virtually the entire German industry disseminated cost calculation models. It claimed that members costs were largely comprised of fixed overheads which in each case had to be related to contract weight before a price could be calculated. The pricing process was accordingly very complex and only major firms had the resources to perform the mathematics accurately. Other, smaller firms were prone to error and consequently loss through miscalculation. The Commission rejected this view of the situation noting that the disseminated models went beyond mere "education" since they gave exact values which acted as recommendations of price. This encouraged price parallelism:

"Model calculations of this type have the effect of recommendations. They encourage the user companies to work from the figures contained in the models, or at least to keep close to them, when calculating their costs and thus indirectly their selling prices."²⁴⁹

As regards the inclusion of average data in the model (which incorporated a profit margin) the Commission stated:

"The inclusion of such data in model calculations leads many users to rely on fictitious quantities when calculating their operating costs rather than working from their actual costs and thereby to arrive at misleading figures."²⁵⁰

The view of the Commission is thus that models which through the inclusion of exact values for individual cost components based upon industry averages tend to encourage parallelism of pricing by users of the model, infringe competition rules. This has been confirmed in other cases.²⁵¹ It is noteworthy that in the Bundesverband decision the association disseminated data on cost components usually computed individually whereas it declined so to do for components the members could satisfactorily analyse themselves (e.g. freight costs and constant cost headings).

(ii) Legitimate Models

In Bundesverband the Commission stated:

"There is an alternative means of catering for firms interest in having a realistic analysis of costing comparisons and inter firm comparisons. It would be sufficient simply to compare the highest and the lowest cost actually observed for each cost component, or to take a selection of the data submitted and offer them as examples; the latter method must not, however, amount in practice to disguised publication of a scatter diagram. There would be no objection to relating the figures thus published to classes of firms classified by size."²⁵²

In the light of the above examination of EEC law the following conclusions may be drawn:

- (a) Progress to stage two is legal.
- (b) Progress to stage three is exemptable under Article 85(3) EEC where industry costs are not easy to determine and relatively fixed so that members will experience considerable difficulties in arriving at accurate costings without assistance.²⁵³
- (c) Associations may be well advised to publish the background statistical and economic data upon which they rely to justify the "reasonableness" of the costings provided such data is not confidential. Data that is disseminated should be in aggregated form which does not enable individual firms to be identified within the statistics. See Chapter 9 on information dissemination for details.
- (d) Trade associations should be very wary of proceeding to stage 4 since this might suggest a desire to harmonise prices. Stage 4 action might be allowed where the nature of the market makes accurate estimation of required profit margins very difficult to determine. Trade associations should do nothing to enforce directly or indirectly the recommended margin if, in exceptional cases, the Commission were to allow such action.
- (e) Wherever publication of data (stages three and four) may encourage price parallelism it will almost certainly be illegal.
- (f) Progress past stage four is almost certainly illegal without exception.

In 1968 the Commission issued a Communication concerning agreements, decisions and concerted practices in the field of co-operation between enterprises.²⁵⁴ This is a non-binding instrument and caution is

advisable when consulting it since the Commission is not bound to adhere to it. The Communication states: "Calculation models containing specific rates of calculation must be regarded as recommendations that may lead to restraints of competition."²⁵⁵ A fortiori, joint schemes devoid of specific rates of calculation, are legal. The communication applies only to agreements which have as their "sole" object, inter alia, the joint preparation of cost models. Where the model is one of a number of restrictions the Communication does not apply.

II. United Kingdom Law

The position under UK law is obscure. The Restrictive Practices Court has examined cost models at depth in relationship to questions of whether fixed prices were reasonable holding in almost every case that proper calculation models were necessary if parties were to persuade the Court of the reasonableness of their prices. However, the Court has never actually examined the model itself to determine whether, per se, it was against the public interest. Nonetheless it can be reasonably assumed that similar conclusions to those reached under EEC law would apply. Indeed, if, as EEC law appears to do, calculation models containing specific values are viewed as recommendations as to price then they would fall within Section 6(1)(b) RTPA 1976 and hence would require registration with the OFT.

An argument which it is submitted must be rejected is that cost calculated models disseminated by trade associations are species of information agreement relating to cost. Information agreements are subject to registration only if the Secretary of State, by statutory instrument, has made an order calling them up for registration.²⁵⁶ To date only information agreements relating to prices charged have been made the subject of an order.²⁵⁷ If cost models can be seen as information agreements relating to cost then, arguably, they need not be registered. This argument should be treated with caution since in EEC law at least information agreements and cost models have always been treated as different species of agreement. The latter is a mechanism for encouraging costing conformity whereas an information agreement pertains to inter-firm flows of data. The law concerning information agreements will be examined in Chapter 9.

L. RENEGOTIATION AND VARIATION (COST ESCALATION) CLAUSES

I. Nature of Problem

Contractual clauses providing for an alteration in price even after the negotiation of the terms has been completed are fairly common. These clauses provide either for a renegotiation of the price with resort to arbitration in the event of dispute or for automatic price variation at the sellers discretion with the customer having an option to terminate the contract at that stage or continue on the varied terms. Such clauses are necessary in industries where input costs to the production of the product in question are prone to fluctuation usually because of variations in raw materials prices on the national or international market. Though, variations in fuel costs, for illustration, may likewise impact upon production or transport costs. Another important variable are wage costs where seasonal advances may often be greater than expected. Sometimes force majeure factors beyond the control of either party cause drastic costs increases.

(i) Legal problems: Difference types of contract clauses

The following situations might give rise to competition problems:

- (a) Sanctity of Contract Clauses: Agreement by trade association members never to renegotiate contracts once concluded destroy an element of price competition viz., the willingness of suppliers to renegotiate the contract price and reduce it in the event of reduction in input costs thereby permitting some of the economies to be passed on to the customer.
- (b) Escalation Clauses: An agreement to incorporate a clause in contracts with customers which provides for increases in the contract price to cover increases in costs. Such a clause means that the supplier retains a normal profit margin despite cost increases; it does not mean that the customer benefits from a reduction in the suppliers costs since the price variation is only activated by costs increases and not costs decreases. This clause transfers the risks inherent in the suppliers production process to the customer. Such a clause usually reflects unequal bargaining power between the parties.
- (c) Selective renegotiation clauses: Suppliers agree to renegotiate prices in the event of costs fluctuations with certain purchasers only. These purchasers might be favoured because of their loyalty



to the suppliers group. The effect can be discriminatory distorting the competitive position between customers inter se.

- (d) Risk transfer clauses: If the supplier can renegotiate the contract price to take account of increases in costs due to the failure of his production or distribution functions then the customer is essentially insuring the supplier against the latter's bad management. Again, such a clause would reflect an unequal bargaining situation with the supplier exploiting his superiority.
- (e) Withdrawal Clauses: A clause not providing for renegotiation but allowing the supplier to withdraw from the contract in the event of an escalation of costs. An equivalent clause permitting customer withdrawal if supplier costs decrease is not included. The clause is made worse if there is no provision for the customer to be compensated for the abrupt withdrawal.
- (f) Procedural limitation clauses: A clause providing for reasonable variation or renegotiation which also provides for procedural conditions making it hard for the customer to benefit from the process e.g. a clause which requires the customer to decide within 12 hours whether he will elect to terminate or continue the contract. The normal 'decision' period is approximately seven days which is sufficient time for the customer to be able to reassess the value of the contract at the higher price to him. A period such as this is necessary given that the customer might need to recontact his own customers (presuming he is not the ultimate consumer) in order to renegotiate prices with them.
- (g) Supplier Option Clauses: Where a purchaser is tied, probably by an exclusive purchase or requirements contract, to a supplier, other suppliers might tempt that purchaser with very low offers. A clause requiring the purchaser to notify the main supplier of such an offer which also allows the main supplier to then choose whether to allow the rival supplier to succeed (i.e. the main supplier releases the purchaser from the exclusive purchasing or requirements clause) or whether the main supplier will himself meet the rival's price, may be anticompetitive where the main supplier is dominant.
- (h) Arbitration Clauses: Invariably arbitration procedures are provided for in the event of dispute. If the supplier refuses to

incorporate an arbitration procedure he could rely upon the sanctity of the contract and refuse to renegotiate if his costs decrease; likewise a powerful customer could refuse to renegotiate if his less powerful suppliers costs escalated.

II. EEC Law

The issue of such clauses has not been prominent in decided cases. Nonetheless, such clauses are common throughout European Industry and commerce. An agreement by the members of a trade association to rely upon the sanctity of the contract and never to renegotiate prices would fall under Article 85(1)(a) which prohibits anti-competitive agreements fixing directly or indirectly trading conditions. Likewise an agreement by suppliers to use these clauses only selectively with customers would be subject to Article 85(1)(d) EEC which prohibits anti-competitive agreements applying dissimilar conditions to equivalent transactions. It is not however necessary that a clause should be expressly covered by the provisions of Article 85(1)(a)-(e) since the clauses specified in the Article are non-exhaustive of the extent of Article 85 EEC.

The adoption of such clauses by an individual supplier in his dealings with customers may fall under Article 86 EEC if the supplier, or the party imposing the terms, is in a dominant position. Article 86 EEC covers abuse of price and business terms interchangeably; unfair or unreasonable variation clauses cover both.²⁵⁸ Whether a clause is unfair is determined by weighing the competing interests of those concerned, which includes third parties.²⁵⁹ Conditions and terms designed to expand a party's dominance are viewed especially critically.²⁶⁰ A clause allowing withdrawal by one party in the event of cost variation which does not provide for compensation of the other party would almost certainly be abusive if imposed by a dominant concern.²⁶¹ Supplier option clauses (described above) have been held to breach Article 86 EEC if imposed on customers by dominant suppliers.²⁶²

III. United Kingdom Law

The OFT adopt the position that renegotiation clauses are legitimate if: (1) they are freely negotiated between the parties; and (2) their terms are fair and reasonable. Free negotiation is prima facie presumed where the

parties are of roughly equal bargaining strength such as would be the case if the clause was negotiated by trade associations representing the supply and purchase sides of the contract. Where parity of bargaining power prevails this also means that the terms will be prima facie deemed to be reasonable; laissez faire and caveat emptor combined may reasonably prevail in such situations. Where inequality of bargaining power exists, perhaps because only one side is represented by a trade association or is a dominant concern, then the terms of the provision will be more closely examined. The following typical clauses have been accepted within the framework of supplier-purchaser contracts and given dispensation under Section 21(2) RTPA 1976.

(i) Clause types and Section 21(2): Examples

Formulae employed to adjust the contract price are considered as desirable in many trades since they give the customer an idea of the extra amount he has to pay. Where the formulae are based upon indexes of labour and materials costs published by Government departments the OFT generally adopt the view that they are acceptable. Where cost adjustments arise because of severe and frequent fluctuations in raw materials prices the formulae may be based on cash-sums rather than percentages of the contract price. These cash sums may be suitable for Section 21(2) treatment though the OFT scrutinise them more closely than formulae expressed in percentages.

- (a) Force Majeure clause: The example is incorporated in contracts in the paper and board industry, agreed upon by all the interested trade associations:²⁶³

"In the event of increases in costs of production of paper and board caused by the act of God, hostilities, threat of war, riot, strike or lock out, the seller shall notify the Buyer of such increase in the cost in respect of any unfulfilled portion of the contract and the Buyer shall have the option of agreeing to pay the extra cost or cancelling the remainder of the contract. Any such notification shall be sent in writing and unless the Buyer within seven working days of receiving the sellers notification of increased cost shall by notice in writing to the seller refuse to pay such increased cost the Buyer shall be deemed to have elected to accept the remainder of the contract and it shall be executed accordingly."

- (b) Cost variation clause: The example is from the contract in (i) supra:²⁶⁴

"In the event of a variation of costs necessarily and properly incurred by the seller after the acceptance

of an order but before the date on which it is necessary to proceed with manufacture in order to meet the delivery requirements of the order, the price shall be increased or decreased within the limits of such variation, subject to reasonable notice being given by either the Seller or Buyer in respect of orders or balances of orders outstanding. The Buyer shall have the option to cancel orders or balances of orders outstanding by notice in writing to the seller within seven days of receiving the seller's notification of an increase in price. Any quotation should also be subject to variation in like manner unless specifically stated otherwise."

- (c) Selective Cost Variation Clause: The example is from the agreement negotiated between the British Wool Confederation and the Worsted Spinners Federation. The clause is the result of an agreement between the associations that members should not be required to use the clause but that it should be available as an option:²⁶⁵

"It is mutually agreed between the parties to this contract that the contract price(s) shall be firm in respect of goods delivered within a period of four months from the date of contract. Thereafter the contract price of goods delivered may be adjusted to take account of subsequent increases in combing charges, plus a further 10% of any such increase to cover topmaking costs. Provided however, that no adjustment shall be made in the contract price in respect of goods delivered within three weeks of the date of any increase in combing charges. The British Wool Confederation, after consultation with the Worsted Spinners' Federation Ltd., will from time to time, but not more frequently than at intervals of three months, issue a list of combing charge variations and any price adjustments to be made under this clause shall be related to such variations."

- (d) Wage Cost Increase Variation Clause: The example is employed by the Worsted Spinners Federation based upon figures calculated by the Federations accountants. The substantive part of the clause is as follows:²⁶⁶

"If after the date of this contract, any new wage advance shall be agreed between The Confederation of British Wool Textiles Ltd. and the NAUTT the price of all yarn not delivered within one calendar month after the effective date of each and every such new wage advance, or of any cost of living advance, shall be increased as follows."

The clause continued to provide that for each 1% of wage advance yarn prices would increase by X pence/kilo depending upon quality of yarn.

(ii) Clauses not Subject to Registration

The only case before the Restrictive Practices Court held that an agreement between members of a trade association not to renegotiate contract prices after conclusion of the contract was not an agreement relating to price "to be" charged or in respect of terms and conditions "to be" applied. The Court of Appeal in Blanket Manufacturers Agreement²⁶⁷ held that Section 6 RTPA 1976 "... is looking to a point of time when the contract is about to be entered into and is not contemplating the case where the contract had already been made".²⁶⁸ The Restrictive Practices Court had held likewise though "... highly beneficial to the members of the association, was not for the benefit of the general public or the wholesalers or retailers dealing with members of the Association and was therefore contrary to the public interest".²⁶⁹

The extent of Blankets is uncertain, it only exempts from registration clauses which do not relate to prices or terms and conditions "to be" charged or applied. Presumably a clause which envisages possible price renegotiation in the future concerns a price "to be" charged or a term or condition "to be" applied. Hence most renegotiation clauses will be subject to the Act.

The OFT could investigate 'sanctity of contract' and other clauses outside the scope of the RTPA 1976 under Section 2(1) CA 1980 where they are imposed by a powerful individual company.²⁷⁰

(iii) Clauses subject to Unfair Contract Terms Act 1977 (UCTA 1977)

Three clauses noted in the list of clause above (Nos. (d), (f) and (g)) might be subject to the "reasonableness" test in the UCTA 1977. Risk transfer clauses may be viewed as attempts by a supplier to exclude or limit loss caused by his own negligence since the loss caused is borne by the customer. If this analysis is correct they are subject to the reasonableness test by virtue of Section 2(2) UCTA 1977 which regulates contract clauses excluding liability for loss or damage caused by negligence. Procedural limitation clauses and arbitration clauses may fall subject to the test of reasonableness by virtue of Section 13(1) UCTA 1976 which regulates clauses "making the liability or its enforcement subject to restrictive or onerous conditions."

The test of reasonableness (Section 11 and Schedule 2 UCTA 1977) includes such factors as: relative bargaining power; whether the customer received an inducement to accept the clause; whether the customer was aware of the clause; whether liability is excluded only in certain cases. In effect the criteria employed generally under the Section 21(2) procedure. The role of the UCTA 1977 is more closely examined in Chapter 11.

M. COLLUSIVE TENDERING

Contracts for the supply of services or the purchase of commodities are often preceded by a tendering procedure whereby prospective clients or buyers invite interested firms to submit tenders for the supply of the goods or services in question.²⁷¹ The invitation may be public or private to specific firms. Invariably the winning bid is the best priced one though ancillary criteria of a technical or quality related nature may be specified. The tender procedure is used commonly for services required for which detailed specifications are already fixed or commodities lacking a relatively stable market price. In these situations tenderers have a wide latitude to adapt their price estimates to meet the specified requirements.

Tenders are favoured methods of allocating work since they represent an objective and uniform means of assessing services or commodities supplied by competing firms. Moreover, since the process reflects somewhat an auction, the winning bid should mirror a truly competitive price. The method is used by governments wishing to sell off or lease state-owned natural resources or surplus capacity. Public authorities also employ the procedure

in respect of constructional work (build installations, construct physical plant etc.) and in respect of the procurement of large job lots of standardised products. Tender procedures are also used in respect of: non scheduled transport, printing and publishing and machine manufacture etc.

I. Legal and economic framework

(i) Legal Problems: Collusive Tendering

Tenderers find it advantageous to collectively share out contracts between them and fix the price at which bids are made. This represents a very serious problem for many authorities who place their trust in tender procedures to result in competitively priced bids and who often accordingly renounce to some degree their right to negotiate prices with the tenderers. Since collusive tendering leads to high, supra-competitive prices, the public purse in effect supports the tenderers profit margins.²⁷²

In tenders for contracts for highly complex or technical services or goods the tenderer often knows more than the client or purchaser. The inclusion of very precise or restrictive technical specifications in the invitation has the effect of limiting the field of potential tenderers. In America, in such market circumstances, it was found to be an offence for bidders to collude with state specifications officers to prescribe requirements particulars suited to those bidders.²⁷³

Collusive tendering is often found during periods of recession when companies agree to share out contracts as an alternative to competition whereby parties undercut each other to a ruinous extent in their attempts to obtain work. The orderly sharing out of work has the advantage of keeping prices high and thereby helping companies maintain capacity.²⁷⁴

Very frequently collusive tendering is organised by a central agency or trade association. Parties are required to notify the association of the contracts they propose to bid for sending in also copies of the bid. The association then disseminates the data to rival bidders. Many different mechanisms exist to facilitate the cartel. The following are commonly used examples: (1) Cover bids - whereby parties take it in turn to win a contract by submitting the lowest bid. This requires a pre-examination of tenders by the association or the parties themselves to ensure that the designated parties bid is in

fact the lowest and that the calculations contained in the bid are correct. The fact that a number of bids are made by firms not intended to succeed misleads the client/purchaser into believing that the bids are competitive; (2) "Give and take" bids - which are common in the construction industry - provide that a contractor who is uninterested in a tender inquires as to the quotation made by his competitors, he then "takes" that price and exceeds it. Conversely, one who is interested in a bid "gives" a price to competitors who agree to cover it.²⁷⁵

Collusive tendering is subject to control in both the EEC and the UK and given its clandestine (semi-fraudulent) nature is never acceptable. Given the almost per se illegality of price-fixing agreements it is believed that collusive tendering has become more common as a surrogate.

(ii) Detecting Collusive Tendering²⁷⁶

The main problem with this practice lies in its detection. Authorities or companies who put work out to tender clearly desire competitive bidding. How can they detect when bids submitted to them are rigged? The following criteria may be useful in detecting the practice and derive from an analysis of prices and detailed costings (numbers (a) - (g) below) and from evidence of collusion found in the formal record of the opening of sealed bids (numbers (h) - (k) below).

- (a) Some of the bidders have quoted prices so high that it is reasonable to assume they had no serious intention of winning the contract;
- (b) Since most schemes operate upon a rota with firms taking it in turns to win a comparison of the bids of firm X in successive tenders might reveal a suspicious discrepancy between the average bid made and the exceptional winning bid;
- (c) Detailed costings might be inconsistent with the firms accounting data. It is usual for firms awarded the contract to calculate each unit price in its estimates by applying a fixed global coefficient to the cost of labour or supplies to cover costs of supervision, operating expenditure, overheads and profits. Comparison between the supposedly "global" coefficients used by the winning firm and: (a) other losing firms; and (b) the same firm on another occasion when it lost, might reveal a discrepancy

- suggesting that the "global coefficient" far from being fixed varies according to whether the firm is expected to win or not.
- (d) Price of tenderers other than the designated firm might reflect the latter's price structure. Generally, group prices are calculated by reference to the designated firm's prices. Since that firm is unaware of competitors' accounting systems he will do no more than ensure that unit prices in detailed costings of cover bids are higher than his own. Thus global prices will be higher. Thus if the designated bidder traditionally allows himself a large margin on labour costs but only a small one on supplies the same characteristic may appear in other parties' costings.
 - (e) Comparison of the global price of the designated tenderer and the second lowest bid will usually show a significant disparity whereas the price difference between the second bidder and the rest will be small. This arises because the designated tenderer seeks to ensure that his is clearly the lowest bid and that he is protected from his own mathematical errors losing him the contract.
 - (f) Where a genuine outsider also bids a comparison of his and the other losing bids will reveal anomalies, coincidences amongst the insiders, simultaneous omissions and errors etc. and the existence of special "balancing" items used in "rigging" prices.
 - (g) The tender from the designated firm often shows features suggesting it is expected to win. Thus for example in a contract for the replacement of pipes the precise length of the new piping will be known whereas the amount of earth to be removed would not. A confident contractor could submit precise costings for items with exact specification and propose cheaper alternatives where the authorities have overestimated. This induces confidence in the contractor by the authority. However, where the authority has underestimated items the contractor does not notify the authority but simply quotes a very high price. When the contract is won and the work commenced the contractor is in a strong position to have these estimates adjusted upwards thereby maximising his profits on them.
 - (h) Usually, for practical reasons, designated bidders, are located in the area of the work suggesting that the parties are sensitive to each other's wishes.
 - (i) Frequently, only the designated firm conducts a serious study of the project. Others will not waste time on futile bids.

- (j) Often only the designated bidder is present when tenders are opened. Alternatively, when a call for tenders is declared inconclusive because price limits have been exceeded the authorities may call for tendering firms to attend discussions; only the designated firm shows up.
- (k) Unexpected coincidences, for example, two firms tendering at almost identical levels might occur suggesting that the price level is a floor-price below which firms have agreed not to tender.²⁷⁷

II. EEC Law

Collusive tendering falls under Article 85(1) EEC and with almost no chance of exemption under Article 85(3) EEC, the real problem therefore lies in those suffering from the practice being able to detect it. In the Sugar industry the Commission discovered, on investigation, that enterprises holding large surpluses has concerted their bids in response to invitations to tender for refunds for exports of sugar to third countries. The practice effected artificially the volume of sugar being exported between Member States and was condemned accordingly under Article 85(1) EEC.²⁷⁸

Collusive tendering is more likely to occur at the national level, it is most common in submissions of tenders by building firms to local authorities. Hence there will rarely be an effect on trade between the Member States so as to activate EEC rules

III. United Kingdom Law

(i) Prevalence

In 1979 a government Committee expressed concern at the growth of this practice: "Collusive tendering is clearly a registerable agreement under the present legislation. However, it is obvious that a form of collusion which is designed to eliminate competition when such competition is precisely the object of the tendering procedure is almost certain not to pass through any of the gateways of the legislation. Since the parties will wish to conceal their collusion, they have no reason to register their agreement. Because of the growing evidence of evasion of the law in respect of collusive tendering and because of the fraudulent nature of the practice we recommend that more stringent action should be taken against this particular practice."²⁷⁹ No such stricter action has been taken, though, it may be reiterated

that collusive tendering will virtually never be legal. Hence, again, the problem is mainly of detection for which guidelines have been given above.

(ii) Under the RTPA 1976

The OFT will virtually never consider collusive tendering appropriate for Section 21(2) treatment.²⁸⁰ Indeed when discovered the parties are always referred to the RPC for prohibitive orders to be made against them. Breach of a Court order is contempt of court for which goal and/or fines may be imposed. The OFT have dealt with a number of cases upon this basis involving: ready-mixed concrete and road surfacing materials; milk; electrical and mechanical services; building projects; and telephone cables.

It almost goes without saying that collusive tendering arrangements are registrable.²⁸¹

(iii) Private remedies in Tort: Section 35(2) RTPA 1976

Private parties who have suffered damage as a result of collusive tendering may sue the parties to the tendering agreement for damages under Section 35(2) RTPA 1976 which permits private actions on the basis of a statutory duty to be proceeded with against parties to unregistered agreements. No case has ever reached the RPC under this Section. However, at least two cases are known to have been settled out of Court upon the basis of this provision. One of these cases involved a settlement of £9m. Details and analysis of these cases and the related problems may be found in Chapter 5 Section H.

(iv) Criminal Sanctions

In 1980 the DTI were considering whether to render collusive tendering a criminal offence under statute.²⁸² However in 1982 it was decided that such a step was unnecessary²⁸³ given that the criminal offence of conspiracy to defraud already embraced collusive tendering.²⁸⁴

(v) Breach of Contract

Some more prudent clients incorporate anti-collusion clauses in contracts with winning tenderers under which the tenderer signs a declaration of non-collusion. Moreover, clauses permitting the client to rescind the contract totally upon proof of collusion are sensible.²⁸⁵

FOOTNOTES

1. For Commission involvement in insurance services see e.g. Industrial Fire Insurance [1982] 2 C.M.L.R. 159. An association of property insurers recommended standard premiums for its members to use in fire and consequential loss insurance. The Commission condemned the agreement on the basis that it was equivalent to a decision by a trade association to fix prices. See also Insurance Bull E.C. 5/69 p. 34. Companies established in four Member States had, through their respective trade associations, agreed on the increased rates of premiums to be charged when a company in one State took over a contract already made by an Insurance Company in another state. Furthermore, when a contract was taken over in this manner there followed a detailed exchange of information on otherwise confidential information. Following Commission intervention the agreement was rapidly dropped. See, Nuovo CEGAM [1984] 2 C.M.L.R. 484 which was the first formal decision of the Commission applying competition rules to insurance services. About 15 Italian direct insurers linked by a reinsurance treaty with firms based outside Italy operated a trade association (Nuovo-Cegam) whose constitutional rules infringed Article 85(1) EEC. The association drew up risk premium tariffs with rates based on common accident statistics which thus excluded loading elements for such items as administrative costs, taxes and profits. Members use these tariffs as a basis for independently determining commercial premiums actually charged to policy holders. Each direct insurer thus sets prices independently. This fact represented a significant change from the practice operating prior to Commission intervention whereby the associations tariff was expressed in terms of commercial premiums. This change enabled the Commission to exempt the agreement under Article 85(3) for a ten year period subject to notification conditions. See also Protection and Indemnity Clubs [1985] 1 C.M.L.R. 238 notice issued pursuant to Article 19(3) of Regulation 17/62/EEC.
2. See e.g. (Case 48, 49, 51-57/69) I.C.I. v. Commission [1972] E.C.R. 619; Cartel in Quinine [1969] C.M.L.R. D41.
3. See e.g. Members of the Genuine Vegetable Parchment Association [1978] 1 C.M.L.R. 534 (international association of paper producers); V.C.H. [1973] C.M.L.R. D16 (Dutch association of cement traders); GISA [1973] C.M.L.R. D125 (Dutch Association of wholesalers of plumbing equipment); The Agreement of Stichting Sigaretten industrie [1982] 3 C.M.L.R. 702; Woolen Fabrics (UIB) Twelfth Commission Competition Report (1982) para. 71 (Italian association of woollen fabric producers).
4. See, V.C.H. [1973] C.M.L.R. D16 at p. D28 para. 47 (Commission).
5. See, Members of the Genuine Vegetable Parchment Association [1978] 1 C.M.L.R. 534.
6. V.C.H. [1973] C.M.L.R. 7 at p. 22 para. 21 (E.C.J.).
7. e.g. Peroxygen Cartel [1985] 1 C.M.L.R. 481 manufacturers in an oligopolistic market clandestinely fixed prices and shares markets. Fines of between 500,000 ECU and 3,000,000 ECU were imposed (i.e. approx. £300,000 to £1,800,000).
8. These are often called 'post-notification' agreements.

9. See Blanket Manufacturers' Agreement (1959) L.R. 1 R.P. 208; [1959] 1 W.L.R. 442 (R.P.C.); (1959) L.R. 1 R.P. 271; [1959] 1 W.L.R. 1148 (C.A.). The Court of Appeal held that a trade association agreement whereunder members could only renegotiate contract prices with customers in the light of variations in world market wool prices with the consent of a committee of the association, was not within s.6(1)(a) RTPA 1976.
10. e.g. Vereeniging Van Cementhandelaren v. Commission (Case 8/72) [1972] E.C.R. 977 concerning a trade association of Dutch cement dealers which recommended to its members the price of cement in Holland. Article 85(1) applied regardless of the fact that no equivalent recommendation applied to exports.
11. For details of Competition Act 1980 see Chapter 3.
12. (1961) L.R. 2 R.P. 173.
13. Scottish Daily Newspaper Society's Agreement (No. 1) (1971) L.R. 7 R.P. 379.
14. but c.f. Cunningham, Fair Trading Act 1973, (1974) p. 242 para. 14-21.
15. See, s.43(1) RTPA 1976.
16. See, Scottish Master Monumental Sculptors' Association's Agreement (1965) L.R. 5 R.P. 437 (R.P.C.). Agreement relating to the price of lettering services on tombstones.
17. See, s.43(1) RTPA 1976.
18. See, European Glass Manufacturers [1974] 2 C.M.L.R. D50.
19. See, V.C.H. [1973] C.M.L.R. D16 (Commission); (Case 8/72) [1972] E.C.R. 977; [1973] C.M.L.R. 7 (E.C.J.).
20. [1975] 2 C.M.L.R. D20.
21. See, V.C.H. [1973] C.M.L.R. D16 (Commission); (Case 8/72) [1972] E.C.R. 977; [1973] C.M.L.R. 7 (E.C.J.).
22. See e.g. ECS/AKZO [1983] 3 C.M.L.R. 694
23. IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20 at p. D32 para. 22 (c.f. also at paras. 19-26). See also, Zinc Producer Group [1985] 2 C.M.L.R. 108 at para. 73 price fixing cannot be justified on the grounds that harmonised prices are needed to counter dumping from States with centrally planned economies.
24. European Glass Manufacturers [1974] 2 C.M.L.R. D51 at p. D71 para. 43.
25. *ibid.*, at p. D68 para. 35.
26. IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20 at p. D36 para. 45.
27. V.C.H. [1973] C.M.L.R. D16 (Commission); (Case 8/72) [1972] E.C.R. 977; [1973] C.M.L.R. 7 (E.C.J.).

28. See e.g. Import of Seeds for Forage Plants into France Bull E.C. 3/76 para. 2109. The governments of four Member States complained about levies imposed on imported herbage seeds into France. The Union Interprofessionnel des Semences Fourragères (UISF), its five member trade associations and five other French trade associations representing producers, breeders distributors and importers of herbage seed charged levies on imports of the main varieties of herbage seed into France. The levies broadly corresponded to the price differential between the high domestic price and the substantially cheaper prices elsewhere in the Community. The agreement set up a scheme of minimum guaranteed prices for breeders, threshold prices for imports of each variety and a range of levies in amounts varying according to variety. Imports from other Member States and in particular Denmark were significantly hindered. The Commission requested UISF to terminate the agreement before the start of the next sowing season and to repay all of the levies unlawfully collected.
29. c.f. note 23 (supra); Belgian Agreement on Industrial Timber Bull E.C. 10/75 para. 2104, Fifth Commission Competition Report (1975) para. 37. The agreements in question affected Belgium and the border areas of other timber-producing Member States. Under the agreement parties agreed: (i) not to purchase timber at above the maximum price fixed by the association for each production area; (ii) not to grant loyalty rebates; (iii) not to draw up lists of suppliers; (iv) to exchange data on purchasing policy; and (v) to employ a standard form contract. The parties claimed that the agreements were necessary to prevent disruptions on the industrial timber market from adversely affecting the performance of contracts between growers and users. The agreement - so it was claimed - was also necessary to prevent harmful speculation on the market to the detriment of Belgian users which included board producers, joiners, printers, publishing houses etc.; were the industries to suffer from such market vicissitudes they might develop into targets for foreign take-over bids. The Commission condemned the agreements replying that where serious economic difficulties were envisaged it was not for private parties to take curative action but for public authorities and/or the Commission to adopt appropriate measures.
30. See e.g. Cimbel [1973] C.M.L.R. D167.
31. See e.g.: Tasca (Case 67/75) [1976] E.C.R. 291; Sadam (Case 88-90/75) [1976] E.C.R. 323; Inno-ATAB (Case 13/77) [1977] E.C.R. 2115; Van Tiggele (Case 82/77) [1978] E.C.R. 25; Buys (Case 5/79) [1979] E.C.R. 3203; Danis (Case 16-20) [1979] E.C.R. 3327.
32. e.g. in the IFTRA Rules for Producers of Virgin Aluminium case "IFTRA" stood for International Fair Trade Rules for Aluminium.
33. [1969] C.M.L.R. D23 (Commission); (Case 48, 49, 51-57/69) [1972] E.C.R. 619; [1972] C.M.L.R. 557.
34. For analysis of these factors, see, Wathelet, *Pratiques concertées et comportements parallèles en oligopole* (1975) *Revue trimestrielle de droit Européen* 664; Joliet, *La Notion de pratique concertée et l'assê ICJ dans une perspective comparative* (1974) *Cahiers de droit Européen*, 254.

35. (Case 48 et seq/69) Dyestuffs [1972] E.C.R. 619 at p. 659. c.f. Tar Colours [1969] C.M.L.R. D23 where the European Court allowed expert evidence to be introduced.
36. Though, the authorities may be suspicious of economic or empirical theories. See European Sugar Industry [1973] C.M.L.R. D65. Economic theory that manufacturers are "normally" only interested in selling to distributors or dealers was rejected; manufacturers often sell to other competitors. For detailed analysis of oligopoly pricing, the factors facilitating it and those suggesting collusion, see, Scherer, Industrial Market Structure and Economic Performance (1980 2 ed.) Chs. 5, 6 and 7.
37. See, Dyestuffs [1972] E.C.R. 619, at pp. 661, 662; Tar Colours [1969] C.M.L.R. D23.
38. The Commission have cited the classic economic article by Stigler, The Kinky Oligopoly Demand Curve and Rigid Prices, (1947) Journal of Political Economy Vol. LV p. 431 as authority. In Zinc Producer Group O.J. 1984 L220/27 at p. 39 para. 75 the Commission examined the zinc market. They noted that certain long standing price agreements had been terminated in 1977 with the consequence that a vacuum existed. there being no natural price leader to act independently in the knowledge that others would follow. The Commission citing Stigler stated: "The situation prevailing in this case seems to have been more characteristic of that which could give rise to what is known in economic theory as 'barometric price leadership'. This does not remove from undertakings the ability to 'determine independently the policy which (they intend) to adopt on the Common market.' Under such circumstances parallel pricing behaviour in an oligopoly producing homogeneous goods will not be in itself sufficient evidence of a concerted practice. However, sufficient evidence may result from parallel pricing in combination with other indications, such as contacts between undertakings on desirable price changes prior to price changes, or the exchange of information which reinforces contacts of this kind."
39. c.f. B.P. Kemi-DDSF [1979] 3 C.M.L.R. 684.
40. c.f. Pioneer O.J. 1980 L 60/21, 34.
41. c.f. IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20 at p. D36.
42. c.f. European Sugar Industry [1973] C.M.L.R. 65.
43. See e.g. BIS-SCR Bull E.C. 11/76 para. 2119.
44. e.g. Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland) Agreement (1959) L.R. 1 R.P. 387; [1960] 1 W.L.R. 393 (R.P.C.) See also, Wholesale and Retail Bakers of Scotland Association's Agreement (1959) L.R. 1 R.P. 347; [1959] 1 W.L.R. 1094 (R.P.C.); Associated Transformers Manufacturer's Agreement (1961) L.R. 2 R.P. 295; [1961] 1 W.L.R. 660 (R.P.C.); Linoleum Manufacturers' Association's Agreement (1961) L.R. 2 R.P. 395; [1961] 1 W.L.R. 781 (R.P.C.); British Bottle Association's Agreement (1961) L.R. 2 R.P. 345; [1961] 1 W.L.R. 760 (R.P.C.).

45. e.g. Blanket Manufacturers Agreement (1959) L.R. 1 R.P. 208; [1959] 1 W.L.R. 442 (R.P.C.); Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland) Agreement (1959) L.R. 1 R.P. 387; [1960] 1 W.L.R. 393 (R.P.C.).
46. Yarn Spinners Agreement (1959) L.R. 1 R.P. 118 [1959] 1 W.L.R. 154 (R.P.C.). See also, British Jute Trade Federal Council's Agreement (1964) L.R. 4 R.P. 399 which involved a price-fixing agreement in similarly depressed market circumstance and illicited an equally unsympathetic response from the Court.
47. e.g. Federation of British Carpet Manufacturers (1959) L.R. 1 R.P. 472; [1960] 1 W.L.R. 356 (R.P.C.); Phenol Producers Agreement (1960) L.R. 2 R.P. 1 [1960] 1 W.L.R. 464 (R.P.C.); British Heavy Steel Makers Agreement (1964) L.R. 5 R.P. 33 (maximum fixed price); British Paper and Board Makers' Associations' Agreement (1963) L.R. 4 R.P. 29; Wire Rope (1964) L.R. 5 R.P. 146; [1965] 1 W.L.R. 121 (R.P.C.).
48. No. 4550 Register of Restrictive Trade Practices, South West Wales Coal.
49. The documents on file No. 4550 (ibid.,) record that at three meetings of the association the following events occurred:
 8 May 1971:
 "There was a complaint against a Merchant undercutting the price of coal in another Merchant's area. This was discussed and finally agreed that the Chairman contacts Mr. A. Hughes on the matter."
 23 March 1977:
 "Unable to come to an agreement as to prices".
 13 April 1977:
 "Milford Haven Merchants threaten to walk out of Association on prices issue".
50. (1963) L.R. 4 R.P. 29.
51. The OFT regularly challenge price fixing agreements and require the parties to determine agreements between them. Often the parties are referred to the RPC for an injunctive order to be made prohibiting continuance with the agreement. For examples on the Register of Restrictive Trade Practices, see: No. S.120 London Tugowners Association recommended tariff and standard terms and conditions (1976); No. S.331 Agreement between Cory Ship Towage Ltd. and C.J. King and Sons (Tugs) Ltd. concerning verbal consultation and agreement on prices to be charged for ship towage services-agreement determined 1981; No. S.100 Southampton Isle of Wight and South of England Royal Mail Steam Packet Company, Ltd. and Alexandra Towing Company Ltd. concerning an oral agreement over tariffs to users of tug and tender services in the Port of Southampton and the sharing of any new business in the Port secured by either party; British Reinforcement Manufacturers Association DGFT Annual Report (1982) p. 98. Association gave an undertaking to the RPC binding upon each of the Members not to enforce the following restrictions or make any agreement to like effect: (i) not to import reinforcing steel from countries outside the EEC; (ii) not to sell their products below agreed floor prices and to abide by the Association's rebate scheme; and (iii) not to limit their deliveries by reference to a formula governing individual market shares. During 1984 the RPC heard undefended cases involving price restriction in respect of: Ferry journeys to Northern Ireland; milk producers; liquified petroleum gas burning heaters; aluminium ingots; and gas fired central heating boilers, See DGFT Annual Report 1984 p. 34.

52. No. 3018 Register of Restrictive Trade Practices. See also from the Register: No. 3162 National Association of Agricultural Contractors (guide prices unacceptable to OFT); No. 3762 Egg Producers Association recommended minimum (prices for ex-farm sales of ungraded 1st quality eggs unacceptable to OFT).
53. No. S.112 Register for Restrictive Trade Practices (1977). A copy of the M.S.A. Journal for October 1977 is contained on the file which records that the Association: "are permitted to respond to requests on any subject and remain free to reply to letters from members as best we can, but no longer can we circulate general information on the question of tuition fees."
54. No. 577 Register of Restrictive Trade Practices.
55. See, Water-Tube Boilermakers' Agreement (1959) L.R. 1 R.P. 285 at p. 334.
56. See Associated Transformer Manufacturers Agreement (1961) L.R. 2 R.P. 295 at p. 344.
57. See e.g. Federation of British Carpet Manufacturers Agreement (1959) L.R. 1 R.P. 472 at p. 534; British Bottle Association's Agreement (1961) L.R. 2 R.P. 345 at p. 365.
58. Permanent Magnet Associations' Agreement (1962) L.R. 3 R.P. 119 at p. 174.
59. See cases cited at note 57.
60. Federation of British Carpet Manufacturers Agreement (1959) L.R. 1 R.P. 472 at p. 534.
61. Yarn Spinners' Agreement (1959) L.R. 2 R.P. 241 at p. 279.
62. Black Bolt and Nut Associations' Agreement (1960) L.R. 2 R.P. 50 at p. 61. See also for similar Court reaction, British Bottle Associations' Agreement (1961) L.R. 2 R.P. 345 at p. 365.
63. Phenol Producers Agreement (1960) L.R. 2 R.P. 1. Phenol is one of a number of products derived from the refining of crude tar acids; the apportioning of costs, therefore, between the different chemicals produced during the refining process is inevitably arbitrary. Furthermore, the raw material itself is not purchased on the open market and thus has no set price.
64. A conclusion made by either the Court or the OFT that the price would be lower in unrestricted conditions may sometimes be questionable at least where the restriction is already long-lived as in Black Bolt and Nut where the agreement had existed for 27 years before arriving before the court.
65. (1960) L.R. 2 R.P. 1 at p. 41.
66. Glazed and Floor Tile Home Trade Association's Agreement (1964) L.R. 4 R.P. 239 (R.P.C.).

67. Cement Makers' Federation Agreement (1961) L.R. 2 R.P. 241; [1961] 1 W.L.R. 581 (R.P.C.).
68. For analysis see Section J below.
69. Distant Water Vessels Development Scheme (1966) L.R. 6 R.P. 242; [1967] 1 W.L.R. 203.
70. See e.g. Permanent Magnet Association's Agreement (1962) L.R. 3 R.P. 119; [1962] 1 W.L.R. 781 (R.P.C.).
71. Black Bolt and Nut Association's Agreement (1960) L.R. 2 R.P. 50; [1960] 1 W.L.R. 884 (R.P.C.).
72. See e.g. Glazed and Floor Tile Home Trade Association Agreement (1964) L.R. 4 R.P. 239 (R.P.C.); Wholesale Confectioners Alliance's Agreement (1960) L.R. 2 R.P. 135.
73. See e.g. Permanent Magnet Association's Agreement (1962) L.R. 3 R.P. 119; [1962] 1 W.L.R. 781 (R.P.C.).
74. See e.g. Wholesale and Retail Bakers of Scotland Association's Agreement (1959) L.R. 1 R.P. 347 at p. 376; Federation of British Carpet Manufacturers (1960) L.R. 1 R.P. 472 at p. 541; Linoleum Manufacturers' Association's Agreement (1961) L.R. 2 R.P. 395 at p. 426.
75. See e.g. British Heavy Steelmakers' Agreement (1964) L.R. 5 R.P. 33.
76. See e.g. British Bottle Association's Agreement (1961) L.R. 2 R.P. 345; Linoleum Manufacturers Association Agreement (1961) L.R. 2 R.P. 395; But c.f. in respect of vertically imposed price restraints (e.g. R.P.M) Net Book Agreement (No. 1) (1962) L.R. 2 R.P. 246; [1962] 1 W.L.R. 1347 (R.P.C.).
77. See e.g. Yarn Spinners' Agreement (1959) L.R. 1 R.P. 118; British Bottle Association's Agreement (1961) L.R. 2 R.P. 345.
78. See e.g. Gisa [1973] C.M.L.R. D125; Italian Flat Glass: Community v. Fabbrica Pisana [1982] 3 C.M.L.R. 366; Cimbel [1973] C.M.L.R. D16; The Agreement of Stichting Sigarettenindustrie [1982] C.M.L.R. 702 (also on aggregated rebates). Vimpoltu O.J. 1983 L200/44.
79. [1973] C.M.L.R. D125.
80. *ibid.*, at p. D133.
81. Cimbel [1973] C.M.L.R. D16.
82. Though it does harm smaller outside firms who are expanding and will in time be capable of supplying larger purchasers. Unless they join the group such suppliers may have those selling options foreclosed to them.
83. See e.g. Gas Water Heaters [1973] C.M.L.R. D231.
84. [1971] C.M.L.R. D6.
85. *ibid.*, at p. D13.

86. [1973] C.M.L.R. D231.
87. See e.g. German Ceramic Tiles [1971] C.M.L.R. D6.
88. (Case 73/74) [1975] E.C.R. 1491; [1976] 1 C.M.L.R. 589.
89. *ibid.*, at p. 1514 para. 28. See also per Advocate General Trabucchi at pp. 1522.
90. [1971] C.M.L.R. D6.
91. See, (Case 73/74) Groupement des Fabricants de Papiers Peints de Belgique v. Commission [1976] E.C.R. 1491 at p. 1523 per Advocate General Trabucchi.
92. See Hoffman-La Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211; [1979] E.C.R. 461; Sugar Cartel (Suiker Unie) (Joined Cases 40-48, 50, 56, 111, 113, 141/73) [1976] 1 C.M.L.R. 295, [1975] E.C.R. 1663; Michelin (Case 322/81) [1985] 1 C.M.L.R. 282 at para. 71 of the judgment.
93. Michelin (Case 322/81) [1985] 1 C.M.L.R. 282.
94. *ibid.*, at p. 333 paras. 84, 85.
95. Hoffman-La Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211; [1979] E.C.R. 461.
96. Such clauses may be exempted under Article 1 Regulation 84/83/EEC O.J. 1983 L173/5 on bloc-exemption for exclusive purchasing agreements. See Commission explanatory memorandum O.J. 1983 C355/7 at para. 35.
97. Cmnd. 9604 (1955).
98. *ibid.*, at para. 213. In the Monopolies and Mergers Commission Report on the Supply of Metal Containers (1970) H.C.P. 6 the Monopolies Commission condemned aggregated rebates on the basis that they did not equate to scale economies and led to entry barriers.
99. *ibid.*
100. (1961) L.R. 2 R.P. 241; [1961] 1 W.L.R. 581.
101. [1961] 1 W.L.R. 581 at p. 604.
102. *ibid.*, at p. 605.
103. *ibid.*
104. e.g. British Reinforced Manufacturers Association (unreported) noted DGFT Annual Report (1982) p. 98; and Aluminium Ingots DGFT Annual Report (1984) p. 34.
105. See e.g. No.S.311 Register of Restrictive Trade Practices, Agreement between AA and Mercantile Credit as to preferential interest rates on loans for members of the AA. Certain restrictive terms had to be removed before Section 21(2) treatment could be applied (1978); and No. 3749 Register of Restrictive Trade Practices, National -

105. continued ...
Association of Musical Instrument Industries (1975). See also Sharman Newspapers and Peterborough Estate Agents Association DGFT Annual Report (1983) p. 33 - Sharman Newspapers gave discounts to members of the Estate Agents Association as quid pro quo for those members agreeing not to place advertisements for domestic property in any journal unless it was also placed in a Sharman paper. Clearly the agreement created considerable entry and expansion barriers to rival advertising mediums who would have difficulty in tempting the estate agents to advertise with them. The OFT referred the agreement to the RPC for prohibitive orders.
106. MMC General Report into Discounts to Retailers (1980-81) H.C. 311. See for related Ministerial statement to parliament H.C. Deb. (1980-81) 4 No. 102, 13 May 1981 Col. 269-271, reprinted DGFT Annual Report (1982) pp. 117, 118. See also O.E.C.D. Report on Buying Power, The Exercise of market power by Dominant Buyers (1981).
107. see *ibid.*, at p. 60 paras. 8.23 - 8.25.
108. e.g. MMC Report into Frozen Foodstuffs H.C. 674 (1976) MMC criticised retrospective discounts because they encouraged retailers to concentrate their purchases on a single supplier and this created entry and expansion barriers for other suppliers; In MMC Report into Cat and Dog Foods H.C. 447 (1977) similar objections were made to retrospective discounts. The MMC were also critical because the discounts were unrelated to costs. However, they concluded that the quantity of the discount (on average 0.7% of gross sales) was insignificant. Compare this with the view of the European Court in Michelin (Case 322/81) [1985] 1 C.M.L.R. 282 at pp. 332, 333 paras. 80, 81 discounts of between 0.2% - 0.4% were not insignificant when operative over a 12 months period; In MMC Report into Ice Cream Cmnd. 7632 (1979) the MMC recommended that retrospective discounts were not anti-competitive but that they should be limited to 12 months in duration and that there should be no follow-over of the discount reference period from one annual supply contract to the next.
109. See e.g. MMC Report into Frozen Foodstuffs H.C. 674 (1976).
110. MMC General Report into Discounts to Retailers H.C. 311 (1980-81) at p. 41 para. 6.35.
111. See D.G.F.T. Annual Report (1984) p. 36. See OFT Report, Competition and Retailing (a study to up-date information in the 1981 report of the Monopolies and Mergers Commission. Discounts to Retailers) (June 1985) where the OFT generally affirm the conclusions of the MMC.
112. 22 July 1982.
113. *ibid.*, at p. 23 para. 7.16.
114. DGFT Annual Report (1982) pp. 83, 84 for text of undertaking.
115. MMC General Report into Discounts to retailers *op. cit.*, at p. 14 paras. 4.18 - 4.20.
116. *ibid.*, at p. 15 para. 4.24.
117. ~~*ibid.*~~, at p. 15 para. 4.23.
118. See e.g. MMC Report into Frozen Foodstuffs H.C. 674 (1976) where MMC critical of discounts given to suppliers who agreed to devote a set percentage of cabinet space to Birds Eye produce.

119. British Telecommunications (Pricing Policy for the Placing of Advertisements in Yellow pages Directories) (10 October 1984) OFT investigation under the CA 1980. See also DGFT Annual Report (1979) p. 44.
120. See Times, September 17 1984 p. 19 report of a lecture delivered by the Director General of Fair Trading to the British Insurance Brokers Association. See No. S.15 Register of Restrictive Trade Practices Building Societies Association BSA 1984 Document V17 dated 18 September 1980 and V31; See also DGFT Annual Report (1976) at pp. 87, 88.
121. See MMC Report on Sheffield Newspapers, investigation under the CA 1980 Cmnd. 8664 (1983). Sheffield Newspapers (SN) granted annual discounts of 5% to estate agents on the condition that they should advertise in the 'Property Telegraph' for at least 48 weeks out of 52. The MMC stated that the test for whether the discount was anti-competitive was whether it prevented advertiser estate agents from placing adverts in rival medias. (at p. 70 para. 7.62). They concluded that, in the circumstances, a 5% discount over one year was inadequate to persuade estate agents to place all of their adverts with 'Property Telegraph'. Accordingly, no anti-competitive effect was found to exist.
122. [1985] 1 C.M.L.R. 282 at pp. 332, 333 paras. 80, 81.
123. See, Sheffield Newspapers, supra.
124. See Howe, Policies towards market Power and Price discrimination in the EEC and the UK p. 151 in George and Joll (eds.) Competition Policy in the UK and EEC (1975). A broad study of the law primarily as developed by the MMC. The author is a senior advisor within the OFT. See, for a wide review of the varieties of form of price discrimination may take, Machlup, Characteristics and types of price discrimination In NBER Business Concentration and Price Policy (Princeton Univ. Press, 1955); Perott, Pricing Policy and Community Rules on Competition and Free Movement of Goods, p. 207 in Yearbook of European Law (1982).
125. See e.g. Deutsche Grammophon v. Metro (Case 78/70) [1971] C.M.L.R. 631 [1971] E.C.R. 487 at p. 501; Sirena v. Eda (Case 40/70) [1971] C.M.L.R. 260 [1971] E.C.R. 351.
126. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429; [1978] 207.
127. See e.g. Brinkhof v. NS and DB [1970] C.M.L.R. 264 Dutch district Court even suggested that acceptance of such pressures might be a prohibited concerted practice with the customer.
128. supra. at note 126.
129. e.g. Union de Remorquage et de Sauvetage v. Schelde Sleepvaartbedrijf [1965] C.M.L.R. 251 (Commercial Court, Antwerp).
130. See e.g. MMC Report on Asbestos H.C. 3 (1972-73) discrimination not objectionable since supplier held insufficient market power; but c.f. MMC Report on Man Made Cellulosic Fibre H.C. 130 (1968) where the MMC rejected justifications from a near monopoly firm for its discriminatory pricing. See also MMC Report on Electrical Equipment for vehicles H.C. 21 (1963) at paras. 990 et seq.

131. MMC Report on the Supply of Indirect Electrostatic Reprographic Equipment H.C. 47 (1976).
132. MMC Report on the Supply of Electric Lamps H.C. 4 (1968) at para. 81.
133. 18 May 1983.
134. *ibid.*, at p. 30 para. 7.2. (The complainant to the OFT in this case was not a customer alleging price discrimination but a rival car-hire firm denied access to BR stations).
135. *ibid.*, at pp. 37, 38 at paras. 8.14 - 8.17. The main concern of the OFT was with the entry barrier caused by BR's exclusive grant of rights to Godfrey Davis. They concluded that the exclusive grant had an insignificant effect upon competition
136. See Posner, *Antitrust Law* (1976) pp. 186-196; Howe, *Policies towards market power and price discrimination in the EEC and the UK* p. 151 at pp. 157, 158 in George and Joll. (eds.) *Competition Policy in the UK and EEC* (1975); Seiden, *Predatory Pricing in the Transportation Industry: One Man's Discount is another Man's War* (1985) U.S. Department of Justice release; Yamey, *Predatory price cutting*, notes and comments, (1972) *Journal of Law and Economics* pp. 129-142.
137. See Posner *op. cit.*, at p. 188: "I believe the most useful definition of predatory pricing is the following: pricing at a level calculated to exclude from the market an equally or more efficient competitor." Posner gives two applications of his definition - (i) selling below short-run marginal cost sale at a price lower than the costs the seller incurs by actually making the sale; and (ii), selling below long-run marginal cost i.e. selling below the costs that must be incurred (and recovered in the selling price) if the supplier is to stay in business in the long term. Posner argues that sales below short-run marginal costs are more likely to have anti-competitive effects than sales below long-run marginal costs. He gives the following example of sales below long term marginal cost: "businesses or parts of businesses have no future. No social purpose is served by forcing a seller to include in his price a charge for the depreciation of a plant that will never be replaced. In these circumstances pricing below long-run marginal cost does not imply an exclusionary intent or effect; on the contrary, the purpose and effect are to make a graceful - a cost minimizing - exit, leaving the field to more efficient firms."
138. See OFT investigation under the CA 1980 into Scottish Universal Newspaper Limited (11 January 1983) at p. 39 para. 8.16.
139. In London Electricity Board OFT Investigation under the CA 1980 (29 April 1982) the OFT concluded that the systematic cross-subsidisation of a product was anti-competitive. The below cost pricing however was apparently attributable to the inefficiency of the costing system rather than predation. But c.f. MMC conclusions. Cmnd. 8812 (3 March 1983).

140. See Howe, op. cit., at p. 157: "Predatory price discrimination involves the seller making price reductions in particular localities or to particular groups of customers with the avowed intention of eliminating competitors, competitors to whom those localities or customers are important sources of business. The seller must enjoy sufficient market power to finance the loss of short-run profit yet must anticipate an extension of that power as a result of his discriminatory tactics such as to more than compensate for that loss. However, not only have many economists questioned the likelihood of such a combination of circumstances, they have also made the point that firms can usually find less risky and less costly ways of securing additional monopoly profits." For an American confirmation that anti-competitive effects flow primarily where the alleged predator seeks to acquire sustainable market power, MCI Communications v. American Tel. & Tel. Co. 708 F.2d 1081 (7th Cir. 1983). Scepticism about the viability of predation as a common strategy is fairly widespread. Seiden, op. cit., at p. 13 cites US policy in the following terms: "... certain market conditions make the establishment of predatory pricing highly implausible. In industries characterized by low barriers to entry, or when the alleged predator has a small market share, we should be especially skeptical of the likelihood that discounting - even deep discounting - is symptomatic of predatory pricing."
141. ECS/AKZO [1983] 3 C.M.L.R. 694.
142. (11 January 1983).
143. *ibid.*, at p. 42 para. 8.28.
144. DGFT Annual Report (1983) p. 86.
145. See e.g. MMC Report on Supply of Certain Industrial and Medical Gases H.C. 13 (1956); MMC Report on Supply and Export of Matches and Supply of Match-Making Machinery H.C. 161 (1953) - extensive price cutting to frustrate incipient competition condemned by MMC.
146. London Electricity Board OFT Investigation under the CA 1980 (29 April 1982) at p. 53-56 paras. 7.10 - 7.19.
147. OFT Investigation into Scottish Universal Newspapers Ltd. (11 January 1983) p. 39 para. 8.16
148. DGFT Annual Report (1983) p. 86.
149. See Business Review letter - US Department of Justice Antitrust Division (December 20 1984) British Airways. See also, Seiden, op. cit., at pp. 4, 5.
150. Seiden, op. cit., at p. 8. The average variable cost model is most generally used today. See Areeda and Turner, Predatory Prices and Related Practices under Section 2 of the Sherman Act (1975) 88 Harvard Law Rev. 697, cited in Southern Pacific Communications v. AT & T 740 F. 2d 980 n.27 at p. 1003 (D.C. Cir. 1984). Nonetheless the model has been criticised, Bork, The Antitrust Paradox: A Policy at war with itself (1978) at p. 154: "True average variable costs cannot be reconstructed adequately from business records in a firm of any complexity When we move to the level of the firm, particularly a multiplant, multiproduct firm, problems of cost estimation and allocation will

continued

150. continued
ensure that the costs the law uses are only coincidentally related to real economic costs. There is a high probability of mistake, and hence of harassment by enforcement authorities and private plaintiffs that would harm consumers by inducing noncompetitive price behaviour."
151. See for analysis Perott, Pricing Policy and Community Rules on Competition and Free Movement of Goods, in Yearbook of European law (1982) at pp. 211-220. See also, Schwarz, in, Van Damme, Regulating the behaviour of monopolies and dominant undertakings in Community law (1977) at pp. 381 et seq. For briefer commentary see Wyatt & Dashwood, The Substantive Law of the EEC (1980) pp. 307-310.
152. See e.g. General Motors Continental (Case 26/75) [1976] 1 C.M.L.R. 95, [1975] E.C.R. 1367; Derek Merson v. British Leyland [1984] 3 C.M.L.R. 92 - Both General Motors and British Leyland enjoyed sole authorisation to perform tasks connected with the importation of vehicles. Both companies thus enjoyed protection from potential entrants and were hence free to abuse their monopoly power over prices.
153. (Case 40/70) [1971] C.M.L.R. 260, [1971] E.C.R. 69 at p. 85. See also Parke, Davis v. Probel (Case 24/67) [1968] C.M.L.R. 47, [1968] E.C.R. 55 at p. 72. Court held that for a plaintiff to sue for infringement of its patent as a means of preventing parallel imports was not per se an abuse under Article 86. However they did accept that, "... the sale price of the protected product may be regarded as a factor to be taken into account in determining the possible existence of an abuse."
154. (Case 26/75) [1976] 1 C.M.L.R. 95, [1975] E.C.R. 1367 at pp. 1378, 1379.
155. (Case 27/76) [1978] 1 C.M.L.R. 429, [1978] E.C.R. 207 at p. 301.
156. Hachette et Nouvelles Messageries de la Presse Parisienne [1979] 2 C.M.L.R. 78.
157. The Belgian wholesalers also paid Belgian VAT on imports.
158. Deutsche Gramophon v. Metro (Case 78/80) [1971] C.M.L.R. 631, [1971] E.C.R. 487.
159. e.g. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429, [1978] E.C.R. 207.
160. [1984] 3 C.M.L.R. 92 at p. 99 para. 28.
161. See Liesner Committee Report, A Review of Monopolies and Mergers Policy Cmnd. 7198 (1978) at p. 21 para. 3.42 which hints that some of the MMC's problems with appraising prices have been accountancy problems: "MMC reports demonstrate that monopoly pricing or profits do occur in a few industries. It is true that in only eight of the 32 reports in the period since 1959 did the MMC find unambiguous evidence of unreasonable prices and profits The difficulty of assessing reasonable profits must, however, be borne in mind while some of the remaining cases were found to be characterised by inefficiency and higher costs than could be expected with keener competition."

162. See e.g. MMC Report on the Supply and Processing of Colour Film H.C. 1 (1966); MMC Report on the Supply of Contraceptive Sheaths H.C. 135 (1975) at paras. 170 and 196.
163. e.g. MMC Report on the Supply of Cat and Dog Food H.C. 447 (1977). Where entry costs are high the MMC has been more stringent, see, MMC Report on the Supply of Chlordiazepoxide and Diazepam H.C. 197 (1973) — entry costs into the drug manufacturing market are high; a 70% profit margin was concluded to be excessive after initial marketing stages. See the Liesner Committee Report, A Review of Monopolies and Mergers Policy Cmnd. 7198 (1978) at p. 21 para. 3.43 and at p. 74 para. 10 - where it is suggested that the MMC Reports show that excessive pricing is usually accompanied by the existence of entry barriers.
164. MMC Report on the Supply of Contraceptive Sheaths H.C. 135 (1975).
165. H.C. 197 (1973).
166. H.C. 13 (1956),
167. H.C. 335 (1969).
168. MMC Report on the Supply of Credit Card Franchising Services Cmnd. 8034 (1982).
169. MMC Report on Supply of Chlordiazepoxide and Diazepam H.C. 197 (1973).
170. See DGFT Annual Reports (1982) at pp. 71, 72, and, (1983) at pp. 79, 80.
171. H.C. 135 (1975).
172. Fifth Commission Competition Report (1975) at para. 3.
173. See, Gammelgaard, Resale Price Maintenance, (European Productivity Agency of the Organisation for European Economic Co-operation (Paris 1958) cited with approval by Advocate General Verloren Van Themaat in VBVB & VBBB v. Commission (Cases 43 and 63/83) [1985] 1 C.M.L.R. 27 at p. 46 n.7.
174. e.g. Deutsche Philips [1973] C.M.L.R. D241; Gerofabriek [1977] 1 C.M.L.R. D35. See also per Advocate General Verloren Van Themaat in VBVB & VBBB v. Commission (Cases 43 and 63/82) [1985] 1 C.M.L.R. 27 at p. 51 where the Advocate General quotes Commission policy: "... the Commission has made it clear from the beginning that it was an avowed opponent of any price agreement relating to the price for the ultimate consumer, whether in the form of a direct agreement or of a resale price imposed on distributors."
175. e.g. Hennessy - Henkel [1981] 1 C.M.L.R. 601; Camera Care/Hasselblad [1982] 2 C.M.L.R. 233 - manufacture threatened to withdraw credit from dealers deviating from a recommended price band.
176. (Case 43 and 63/82) [1985] 1 C.M.L.R. 27 at pp. 46, 47.
177. e.g. A.R.O.W. v. B.N.I.C. [1983] 2 C.M.L.R. 240; FEDETAB (Cases 209-15 and 218/78) [1981] 3 C.M.L.R. 134 [1980] E.C.R. 3125.

178. Vereeniging Van Cementhandelaren (Case 8/72) [1973] C.M.L.R. 7, [1972] E.C.R. 977.
179. See e.g. Papier Peints [1974] 2 C.M.L.R. D102 - where Commission relying on principle in Cementhandelaren supra proceeded against the Belgian Wallpaper industry for attempts at collective r.p.m. On appeal ((Case 73/74) [1976] 1 C.M.L.R. 589, [1975] E.C.R. 1491) the Court reaffirmed their dictum in Cementhandelaren but quashed the Commission's decision on the basis that they had not adequately established an effect on trade between the Member States.
180. (Case 43 and 63/82) [1985] 1 C.M.L.R. 27.
181. *ibid.*, at p. 49.
182. *ibid.*, at pp. 49, 50.
183. *ibid.*, at pp. 92, 93 para. 40. Thus because all of the Member States tolerate r.p.m. for books this does not mean that the same should apply in EEC law.
184. *ibid.*, at p. 92 para. 37.
185. (Case 27/76) [1978] 2 C.M.L.R. 1, [1977] E.C.R. 1875. See also, Agence Europeene d'Interims v. Commission (Case 56/77) [1978] E.C.R. 2215 - In recruiting temporary staff via an agency European Commission not bound to accept lowest tender made by an agency since price not essential competitive element, quality of agency and the social duty to pay higher salaries to better qualified employees were more important.
186. e.g. Pharmaceutische Handelsconventie [1978] 1 C.M.L.R. 509 price considered essential ingredient in competition for drugs.
187. See generally Cunningham, The Fair Trading Act 1973 (1974) Ch. 17; Korah, Competition Law of Britain and the Common Market (1982) Ch. 8 and for older commentaries: ~~Summerfield~~ and Stanbrook, The Resale Prices Act (1964); Macdonald, Resale Price Maintenance (1964); and, for an exceptionally good general account of the practice, Pickering, Resale Price Maintenance in Practice (1966).

188. Information (where available) from DGFT Annual Reports 1977-1984 on complaints made to OFT of infringements of Resale Prices Act 1976 and of complaints found to justify some OFT action. This action was usually advice to the supplier to amend publicity literature. In other cases informal undertakings were accepted from suppliers.

DATE	COMPLAINTS	NUMBER OF CASES WHERE OFT TOOK SOME ACTION
1977	-	8
1978	-	-
1979	28	-
1980	25	at least 5
1981	33	7
1982	31	1
1983	23	1
1984	-	1

189. 'Price' in this context includes a charge of any description (Section 8(1)). Moreover price conditions include conditions: (i) as to the amount of discount allowed on resale of the goods; and (ii) as to prices to be paid on the resale of goods for other goods taken by way of exchange (Section 6).
190. Section 1(1)(a)-(c) RPA 1976.
191. Section 1(2) RPA 1976.
192. Section 2 RPA 1976.
193. Section 4 RTPA 1976.
194. Section 9 RPA 1976.
195. Though if a supplier fixes a "maximum price" which in reality is used, and is intended to be used as a price for dealers to adhere to and not undercut, this will probably be treated as a minimum price contrary to Section 9. See Wholesale and Multiple Bakers Federation Agreement (1959) L.R. 1 R.P. 387. RPC treated maximum price as a fixed price where parties adhered to it.
196. Section 9(2) RPA 1976.
197. Section 10 RPA 1976.
198. Section 10(3) RPA 1976. There are a number of reasons for this. First sales by a licensee are not resales, they are new sales; secondly, the licensing of intellectual property is not apparently the supply of goods or services - Ravenseft v. Director General of Fair Trading [1977] 1 All E.R. 47, DGFT Annual Report (1976) p. 36; thirdly, such a price clause would be exempt under Schedule 3(5) RTPA 1976 exempting patent licenses (where not in a patent pool) from the RTPA 1976.

199. Section 11(1) RPA 1976, "Resale price" in respect of a sale by description is defined in Section 11(2) and means: any price published or notified to dealers as a minimum price or as a recommended minimum price; and, any price prescribed for that purpose by a contract between the dealer and supplier.
200. Section 11(3) RPA 1976.
201. See Korah, op. cit., at p. 187 for examples of problems related to this wording.
202. Section 12(2) RPA 1976. See e.g. Comet Radiovision v. Farrell-Tandberg (1971) L.R. 7 R.P. 168 - RPC granted interlocutory injunction against supplier who withheld supplies from dealer who advertised that he sold at "cut prices". RPC said to withhold supplies in this situation was the same as withholding supplies from a dealer who was likely to cut prices. In Oxford Printing Co. Ltd. v. Letraset Ltd. (1970) L.R. 7 R.P. 94 RPC refused an interlocutory injunction since dealer had withheld supplies, not because dealer cut prices, but because the dealer advertised to customers to use a competitors product.
203. See e.g. OFT investigations under the CA 1980 into: Raleigh Industries (27 February 1981); Arthur Sanderson (27 August 1981); Still Services (22 July 1982).
204. Section 12(3) RPA 1976.
205. ibid.
206. Section 13 RPA 1976.
207. See J.J.B. (Sports) Ltd. v. Milbro Sports Ltd. [1975] I.C.R. 73 at p. 75A.
208. ibid.
209. See Liesner Committee Review of Restrictive Trade Practices Policy (Cmd. 7512) 1979 pp. 51-53 paras. 5.59 - 5.65.
210. In the USA it has been held that the existence of dealer complaints coupled to a subsequent refusal to supply by a supplier to a price-cutting dealer does not, in the absence of additional evidence, amount to a combination or conspiracy to fix resale prices under the Sherman Act, Section 1. - Monsanto Co. v. Spray-Rite Service Corp. 104 S. Ct. 1464 (1984). Monsanto however lost on the facts and were required to pay \$10,500,000. The Supreme Court stated that there must exist, in addition to evidence only of buyer noise and a refusal to deal, "... direct or circumstantial evidence that reasonably tends to prove that a manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective."
211. But the CA 1980 applies, see Raleigh Industries (27 February 1981) which seems to doubt whether the OFT and MMC will accept this argument.
212. Chocolate and Sugar Confectionary Reference (1967) L.R. 6 R.P. 338.
213. Footwear Reference (1968) L.R. 6 R.P. 398.
214. Medicaments Reference (1970) L.R. 7 R.P. 267.

215. Net Book Agreement, 1957 (1962) L.R. 3 R.P. 246, [1962] 1 W.L.R. 1347 noted Yamey (1963) 26 M.L.R. 691, criticised passim in, Stevens and Yamey, The Restrictive Practices Court (1965); and, Turner, Competition and the Law (1966).
216. The RPA 1976 was a consolidation of earlier legislation viz., Monopolies and Restrictive Practices (Inquiry & Control) Act 1948 which subjected r.p.m. to investigation by the MMC. Early MMC reports were critical e.g. MMC Report on Supply and Export of Pneumatic Tyres H.C. 133 (1955); MMC Report on Supply of Electrical Equipment for Mechanically Propelled Land Vehicles H.C. 21 (1963).
217. See Goodyear Tyres v. Lancashire Batteries (1957) L.R. 1 R.P. 22; County Laboratories v. Mindel (1957) L.R. 1 R.P. 1; Mackintosh v. Bakers Bargain Stores (Seaford) Ltd. (1965) L.R. 5 R.P. 305, (1965) 1 W.L.R. 1182 (Sale by liquidator not a resale, liquidator does not acquire title, purchaser from liquidator may be bound).
218. On whether the provision of non-price benefits may be prohibited see Gallagher v. Supersave Supermarkets (1964) L.R. 5 R.P. 89; Beechams Foods v. North Supplies (1959) L.R. 1 R.P. 262.
219. See e.g. Director General of Fair Trading v. Hotpoint (1979) DGFT Annual Report (1979) p. 47 - proceedings settled on basis of an undertaking given by the defendant, Hotpoint Ltd., to supply their electrical appliances to Comet Radiovision Services Ltd. on terms not significantly less favourable than those normally applied by Hotpoint to dealers carrying on business in similar circumstances to Comet. The Court order also contained agreements and undertakings by Hotpoint and Comet with regard to a range-stocking agreement between them. In addition Hotpoint gave an informal, out of court undertaking to the OFT to comply with the Act.
220. See Chapter 5 Section H for details of such actions.
221. For examples of negative assurance cases see: DT Products Ltd. DGFT Annual Report (1980) p. 116; Trafford Carpets Ltd. DGFT Annual Report (1980) p. 116; Shulton (Great Britain) Ltd. DGFT Annual Report (1980) pp. 116, 117; Revlon International Corporation DGFT Annual Report (1980) p. 117; Lanvin Perfumes Ltd. DGFT Annual Report (1980) p. 117; Ascot (Sports Goods) International Ltd. DGFT Annual Report (1981) p. 113; Tildawn Electronics Ltd. DGFT Annual Report (1983) p. 106; Apple Computer (UK) Ltd. DGFT Annual Report (1984) p. 107 - in this last case the OFT obtained an undertaking that more closely defined the circumstances in which the supplier could and could not refuse to supply or otherwise discriminate against dealers. This might be an indication of future OFT policy on the drafting of undertakings.
222. e.g. Shulton (Great Britain) Ltd. DGFT Annual Report (1980) pp. 116, 117 clause 4 of the undertaking; and, Revlon International Corporation DGFT Annual Report (1980) p. 117, clause 4 of the undertaking.

223. e.g. Lanvin Perfumes Ltd. DGFT Annual Report (1980) p. 117 clause 1 of the undertaking. The OFT may also require suppliers to obtain confirmation in writing from dealers that they are aware that the suppliers policy has changed. In Ault and Wiborg Paints Ltd. DGFT Annual Report (1981) p. 113 the supplier gave an assurance to the OFT on the following lines: "we have already advised those of our distributors presently holding agreements that the relevant clauses have been deleted and have asked for their confirmation of such deletion in writing". Clearly, some of the undertakings given to the OFT may involve suppliers in obtaining their dealers approval to the amendment of existing contracts though it should be recalled that clauses providing for r.p.m. are automatically void under Section 9(1) RPA 1976.
224. [1973] C.M.L.R. D167.
225. *ibid.*, at p. 184, 185 para. 37.
226. Fine Papers [1972] C.M.L.R. D94.
227. Cimbel [1973] C.M.L.R. D167.
228. *ibid.*, at p. D196 para. 49.
229. (1963) L.R. 4 R.P. 156, [1963] 1 W.L.R. 897 at p. 903, See also at p. 904.
230. See, Wilhelm v. Bundeskartellamt (Case 14/68) [1969] C.M.L.R. 100, [1969] E.C.R. I; "One and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under Article 85 of the EEC Treaty, the other before the national authorities in application of internal law However ... such parallel application of the national system should only be allowed in so far as it does not impinge upon the uniform application, throughout the Common Market, of the Community rules on restrictive business agreements and of the full effect of the acts decreed in application of those rules Conflicts between the Community rule and the national rules on competition should be resolved by the application of the principle of the primacy of the Community rule."
231. [1972] C.M.L.R. D94. c.f. also Central Stikstof Verkoopkantoor [1979] 1 C.M.L.R. 11 at p. 35 para. 74 for an analogous situation commented upon by the Commission.
232. i.e. Water-Tube Boilermakers' Agreement (1959) L.R. 1 R.P. 285; [1959] 1 W.L.R. 1118 (R.P.C.).
233. See, Schedule 3 paras. 6 and 9 RTPA 1976.
234. For detailed economic analysis see, Scherer, Industrial Market Structure and Economic Performance (1980, 2nd ed.,) pp. 325-334.
235. See e.g. Fort Howard Paper Company v. F.T.C. (1946) 348 F. 2d. 674 (7 Cir.); U.S. v. National Lead Company (1947) 332 U.S. 319; United States Maltsters' Association v. F.T.C. (1945) 152 F. 2d. 161 (7 Cir.); Milk and Ice Cream Can Institute v. F.T.C. (1946) 152 F. 2d. 478 (7 Cir.); Federal Trade Commission v. Cement Institute (1948) 333 U.S. 683.
For analysis of these cases, see Neale and Goyder, The Antitrust Laws of the U.S.A. (1980 3rd ed.) at pp. 53-57.

236. See Commission Reply to W.Q. No. 1002/77, O.J. 1978 C 113/8 at p. 9.
237. Though caution should be used in this defense point. Base point pricing encourages suppliers to sell close to home in order to reduce freight costs, hence it is not unlikely that a substantial majority of a smaller suppliers trade will be to purchasers close to him. Thus, on most sales he will earn "phantom freight costs" profits.
238. See W.Q. No. 1002/77, O.J. 1978 C113/8 by M.E.P. Mr. Glinne and Commission answer, 1978 O.J. C113/9. See also Sixth Commission Competition Report (1976) paras. 48-50.
239. *ibid.*
240. *c.f. ibid.*, per M.E.P Mr. Glinne who was sceptical of the competitiveness of geographical price systems in "a market structure characterized by a standard product with a low value per unit of weight, no elasticity of demand and an oligopolistic market supply situation." He continued later: "Does the Commission agree that as long as such geographical price systems continue, the prohibition of other concerted practices is often likely to be ineffective? Is there not a danger that they will seriously undermine the unity of the Common Market?" The gist of the Commission reply was that whilst most systems were in danger from Articles 85 and 86 EEC some systems developed naturally in the market and were hence legal.
241. See F.T.C. v. Cement Institute (1948) 333 U.S. 683.
242. [1974] 2 C.M.L.R. D50.
243. *ibid.*, at pp. D72, 73 para. 48. See also Comptoir Belge De L'azote (Cobelaz) Agreement [1968] C.M.L.R. D68 at pp. D75, D76 para. 16.
244. See e.g. Central Stikstof Verkoopkantoor [1979] 1 C.M.L.R. 11 at p. 42 para. 101; Floral Düngemittel Verkaufsgesellschaft [1980] 2 C.M.L.R. 285 at pp. 291, 292 paras. 27-30.
245. *ibid.*
246. (1961) L.R. 2 R.P. 241; [1961] 1 W.L.R. 581 (R.P.C.).
247. See e.g. Monopolies and Mergers Commission Reports into: Plasterboard H.C. 94 (1974) where the conduct against the public interest was PBP's system of uniform delivered prices. The MMC recommended that a "zonal system" be introduced within which the delivered price for each type and load of plasterboard would be based on the total cost of production plus average freight costs to that zone; Building Bricks H.C. 474 (1976) where the MMC responded to a delivered pricing system by recommending that transport costs should be specific to the customer. In both cases the MMC was concerned that the systems discriminated unjustifiably between customers and in both cases appropriate undertakings had to be given to the OFT.
248. [1980] 3 C.M.L.R. 193.
249. *ibid.*, at p. 204 para. 54.

250. *ibid.*, at p. 205 para. 55.
251. See e.g. European Glass Manufacturers [1974] 2 C.M.L.R. D50 at p. 64 paras. 19, 20; IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20 at pp. D35, D36 para. 43.
252. [1980] 3 C.M.L.R. 193 at p. 205 para. 56.
253. e.g. In Nuovo CEGAM [1984] 2 C.M.L.R. 484 the Commission granted Article 85(3) exemption to an agreement whereby a central trade association in the market for engineering insurance collected statistical data on claims experience from its members. The Association used the data to draw up a common tariff of basic premiums for various type of risk. Members agreed to abide by this basic premium though they were entirely free to add margins for expenses, commission and profit. Article 85(3) exemption was granted for the following reasons: (1) the engineering insurance market in Italy was characterised by weak demand and relatively limited supply. To do business an insurer needed highly specialised resources and considerable technical skill and knowledge. The trade association provided specialist expertise (statistical data, risk studies, prevention techniques etc.) and hence improved the production and distribution of insurance services and promoted technical and economic progress. Consumers benefited since the work of the association helped enlarge the capacity of the industry thereby widening the choice available to consumers and led to the offering of a more technically advanced product on competitive terms. It should be understood that firms remained free to set their own final prices, the trade association tariff was only a bare price to which other components had to be added.
254. O.J. 1968 C75/7 [1968] C.M.L.R. D5.
255. *ibid.*, Article II(1)(4).
256. See, Section 7(1) RTPA 1976.
257. Restrictive Trade Practices (Information Agreements) Order 1969, S.I. 1969 No. 1842.
258. Italy v. Sacchi (Case 155/73) [1974] 2 C.M.L.R. 177, [1974] E.C.R. 409 at p. 431.
259. BRT v. SABAM (Case 127/73) [1974] 2 C.M.L.R. 238 (E.C.J.), [1974] E.C.R. 313 at p. 317.
260. Gema [1971] C.M.L.R. D35 (Commission).
261. *ibid.*
262. See e.g., Hoffman La Roche v. Commission (Vitamins) (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 1869.
263. No. 1283 Register of Restrictive Trade Practices Agreement between British Paper and Board Industry Federation, National Association of Paper Merchants, British Paper Bag Federation and the British Paper Box Ltd.

264. *ibid.* A clause in a standard form contract providing that there will be no variation between the price quoted by a supplier when the booking was made and the price actually charged the client, may be suitable for Section 21(2) treatment. See e.g. No. 39 Register of Restrictive Trade Practices, National Association of Holiday Centres (1979).
265. No. 3827 Register of Restrictive Trade Practices Agreement between the Members of the British Wool Confederation and the Worsted Spinners Federation (1980). See also No. 1147, Register of Restrictive Trade Practices Agreement between the CEGB and the Thermal Insulators Contractors Association (1981).
266. No. 1569, Register of Restrictive Trade Practices, Agreement amongst members of Worsted Spinners Federation (1981).
267. [1959] L.R. 1 R.P. 208; [1959] 1 W.L.R. 442 (R.P.C.); (1959) L.R. 1 R.P. 271; [1959] 1 W.L.R. 1148 (C.A.).
268. [1959] 1 W.L.R. 1148 at p. 1153.
269. [1959] 1 W.L.R. 442 at p. 455.
270. See Chapter 3 for details of the CA 1980 procedure.
271. For detailed analysis of the practice see, O.E.C.D. Report of the Committee of Experts on Restrictive Business Practices, Collusive Tendering (1976); and, Department of Trade Consultative Document: Collusive Tendering (1980).
272. See O.E.C.D. Report *op. cit.*, at p. 10 where it is noted that in the United Kingdom public contracts amounted to about 13% of G.N.P. An average figure for developed nations would be in the region of 10%.
273. See Whittan v. Paddock Pool Builders (1970) 424 F.2d 25, 30 (1st Cir.) cert. denied (1970) 400 U.S. 850.
274. O.E.C.D. Report *op. cit.*, at pp. 12-16. Collusive tendering is most common in industries where there are a large number of medium sized enterprises and where strong price competition prevails. It is rare in concentrated and oligopolistic markets since price competition is not prevalent and the collusion would be difficult to keep secret.
275. *ibid.*, at pp. 16-23.
276. These are based upon the successful criteria developed for use by the French Department of Internal Trade and Prices (see, O.E.C.D. Report, *op.cit.*, pp. 79-83).
277. See, Department of Trade Consultative Document *op. cit.*, at p. 2 para. 6: "Tenderers might agree not to submit tenders below a certain price, or to add an amount or proportion to the price they would otherwise propose. There are however difficulties with these approaches. If more than one tender is received at the same price - the 'floor price' - collusion will immediately be expected. The other approach - the 'surcharge' approach - requires an excessive amount of mutual trust among the tenderers, since they will be strongly tempted to adjust their initial price downwards, taking account of the agreed surcharge, in order to secure the contract."

278. See (Cases 40-48, 50, 54-56, 111, 113, 114/74) Sugar Cartel [1976] 1 C.M.L.R. 295 (E.C.J.), [1975] E.C.R. 1663.
279. A Review of Restrictive Trade Practices Policy: A Consultative Document Cmnd. 7512 (1979) p. 50 para. 5.52. The practice is indeed common: (1) Following an investigation into firms concerned with electrical installations or mechanical services in building projects between 1963-1969 over 70 different collusive Tendering agreements were discovered and condemned. The agreements related to work on sub-contracts in major public and private sector works; (2) At the beginning of 1975 it was disclosed that, in the preceding ten years, the supply of telephone cables to the Post Office had been subject to collusion. The four suppliers of external telephone cable (who controlled almost all of this market) allocated quotas to the various contacts and adjusted prices to ensure the designed distribution of work. (See DGFT Annual Report (1975) at p. 91); (3) In 1978 the Restrictive Practices Court condemned over 60 collusive tendering arrangements made in the cement industry covering almost the whole country. For a selection of the agreements themselves, see, Nos. 4218, 4246, 4221, 4223, 4257, 4305 Register of Restrictive Trading Practices. For an interesting sequel to these cases, see, British Concrete Pipe Agreement [1982] I.C.R. 182 (R.P.C.); (4) In recent years in the U.S.A. the enforcement policy of the Department of Justice Antitrust Division has been focussed upon price fixing, market sharing and collusive tendering. The latter practice has been found to be very widespread. Between 1980-85 the Antitrust Division filed 418 criminal cases against 1,002 defendants (527 companies and 475 individuals). These cases resulted in total fines exceeding \$100m U.S. (\$95m for companies, \$5m for individuals). In addition 200 corporate officials were gaoled for average periods of 119 days. The total period of gao! for these persons was 65 years - See Bloch, Antitrust Compliance Programs and Litigation: Myth and Reality - paper to 18th New England Antitrust Conference, Harvard Univ. Law School (Nov. 2 1984).
280. but c.f. No. 3592 Register of Restrictive Trade Practices, Agreement between members of Builders conference (1977). Parties notified information regarding invitations to tender, tenders submitted and contracts awarded to the Secretariat of the conference who disseminated the information to members who signified an interest in the same work. The information disseminated included details of tender prices though these were not communicated either to the Secretariat or to other members until after the closing date for submission of tenders. The OFT granted dispensation from reference to the RPC rather surprisingly. They apparently accepted that the conference could not be abused and was a useful data dissemination organisation.
281. See e.g. Birmingham Association of Building Traders Employers Agreement (1963) L.R. 4 R.P. 54 where a narrow view was taken. However a wider view of registrability subsequently became the norm. See Exeter Hospital Electrical Contractors Agreement (1970) L.R. 7 R.P. 102, [1970] 1 W.L.R. 1391; Telephone Apparatus Manufacturers Application (1962) L.R. 3 R.P. 98 and on app. at p. 462.
282. Department of Trade Consultative Document op. cit., at pp. 5-9, paras. 15-31. The statute would be along the lines of the Auctions (Bidding Agreements) Act 1927 as amended in 1969.

283. H.C. Vol. 34 No. 37 C.641 (23.12.82).

284. See Scott v. Metropolitan Police Commr. [1975] A.C. 819 at p. 1039 per Viscount Dilhorne: "It is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud." See further Welham v. DPP [1961] A.C. 103: "A person is also defrauded if he is deceived into acting contrary to his public duty" - it is surely a local authority's public duty not to squander rate payers money on excessive tenders. If a plaintiff is induced by fraud into taking an economic risk which he would not have otherwise taken but for the deception then the offence will have taken place: Allsop [1976] Crim. L.R. 738 (C.A.); Hamilton (1845) 1 Cox c.c. 244; Carpenter (1911) 22 Cox 618.

285. See Department of Trade Consultative Document op. cit., at p. 4 para. 13.

CHAPTER 9

THE EXCHANGE AND DISSEMINATION OF INFORMATION

A. INTRODUCTION

I. Introduction

An information agreement may be described as an arrangement whereby companies exchange between themselves information concerning, inter alia, production costs, selling prices, market demand, creditworthiness of customers, stock levels. Such agreements are very common in business where they are used to improve their own and the markets efficiency. Conversely, such agreements may simply be mechanisms to facilitate a price-fixing or market sharing agreement.¹ For example, the exchange of data on prices to be charged (e.g. by exchanging price lists before their publication) is a common method of organising a price-fixing agreement. Some information agreements are operated innocently but, nonetheless, have an anticompetitive effect because of prevailing market circumstances. It is accordingly very important for businessmen and their advisers to be able to differentiate the competitive from the anti-competitive agreement.

In this chapter the following will be examined:

Section B: Legal framework: the system of control in the EEC and UK.

Section C: Price information: Exchange of price data causes greatest problems and raises the greatest risks for businessmen.

Section D: Detecting Anti-competitive Price Exchanges: EEC and UK: Some guidelines on how to detect exchange of price data cartels.

Section E: Contract Terms and Conditions: EEC and UK: The exchange of data concerning terms and conditions may, in some cases be anticompetitive. This section explains how to differentiate "bad" from "good" exchanges.

Section F: General Market Data: Exchanges of general data may be harmful or beneficial for the market. Again the problem is differentiating "bad" from "good". Common trade association practices are considered e.g. inter-firm comparisons; business ratio pyramids; global industry data, etc.

Section G: Refusal to Disclose Information: When the refusal by a dominant firm to provide information may be anti-competitive.

Section H: Specimen Compliance Scheme: Series of rules summarising the relevant principles.

II. Economic background

Exchanges of information are of ambiguous value to the market. Some exchanges enhance competition; others stifle it. Much will depend in each case upon the nature of the data exchanged and the economic context of the market. If three oligopolistic firms holding markets shares of, for example, 26%, 17% and 30% exchange price data and this leads them to price their goods uniformly then the market suffers, cartel like price rigidity has evolved from an exchange of price data. Conversely, if a number of small firms exchange data on various market criteria relating to their respective cost structures this may enable them to respond in a more educated and hence efficient manner to larger competitors. Accordingly, as a general rule the more concentrated the market the less likely the chances of an official sympathetic response.

Where statistical and other data is being disseminated a number of rules of thumb may be used. These are noted below. The practical consequences of these rules are examined throughout the chapter. In Section H a specimen set of compliance rules are given for guidance.

- (i) Data should be past. Data that refers to past market conditions, transactions etc. cannot easily be used by parties to determine accurately the future conduct of rivals.
- (ii) Data should be anonymous. Information should, when disseminated, not refer to individual participants; it should not be possible to identify a rivals "vital statistics" from disseminated information.
- (iii) Data should be aggregated. Information should be in summary, composite form. Again, this prevents accurate figures being given which may be attributed to specific firms.

Exchanges of data complying with these rules of thumb stand an increased chance of being accepted by the OFT and Commission.

B. LEGAL FRAMEWORK

I. EEC Law

Information agreements relating to goods and/or services are caught by Article 85(1) although not expressly listed in the examples of restrictive practices in Article 85(1)(a)-(e) EEC. The Commission, as noted above, attach considerable relevance to market analysis as evidenced by their 1968 "Communication concerning agreements, decisions and concerted practices in the field of co-operation between enterprises".² In this non-binding expression of opinion it is stated that so long as the information exchanged is used by parties to determine their market strategy freely no objections arise. This statement applies to: exchanges of opinion and experience; joint market research; execution of joint comparative studies of enterprises or industries; joint preparation of statistics and cost models. However, where the data is used to co-ordinate the participants behaviours, "a restraint of competition may occur in particular on an oligopolistic market for homogeneous products".³ Market structure is thus of great relevance.⁴

The making available of information otherwise freely available in official statistics etc. is clearly legitimate e.g. the notification inter-se of patent applications or trademark registrations. However where through an agreement firms obtain, non-official, commercially valuable data which they could have obtained individually at far greater expense and effort (e.g. through their own distribution network of dealers etc.) the Commission will view the agreement suspiciously. In Re VNP & COBELPA⁵ they stated that such a system, "... artificially alters the conditions of competition and establishes between competitors a system of solidarity and mutual influence".⁶ Agreements to which only one side of the market viz., suppliers and not customers, are party cannot be justified on the basis that they "perfect" the market i.e. they render the market transparent since in perfect markets data is available to buyers and sellers.⁷

II. United Kingdom Law

The United Kingdom law is very complex; only certain species of informational exchange need be registered. In brief the possible forms of agreement subject to registration are those listed in Section 7 (re. goods) and 12 (re. services) RTPA 1976. From those listed only those made the subject of a calling up order by the Secretary of State need be registered.⁸

Thus, agreements are only registerable if so designated by Statutory Instrument. This section examines those agreements enumerated in Sections 7 and 12 RTPA 1976 which might be called up for registration and those agreements which have already been called up.

(i) Sections 7 and 12 RTPA 1976: Forms of Agreement for Calling Up

Attention will be concentrated upon Section 7 since Section 12 (services) repeats, mutatis mutandis, its terms and no calling up order has yet been made

Section 7(1) RTPA 1976 defines "information agreement" as:

"an agreement between two or more persons carrying on within the United Kingdom any such business as is described in Section 6(1) [RTPA 1976] ... whether with or without other parties, being an agreement under which provision is made for or in relation to the furnishing by two or more parties to each other or to other persons (whether parties or not) of information in respect of any of the following matters ..."

These matters are listed in Section 7(1)(a)-(h) and may be summarised as follows:

- (a) prices charged, quoted or paid or to be charged, quoted or paid;
- (b) prices to be recommended as resale prices;
- (c) the terms and conditions on which goods are supplied;
- (d) the quantities and descriptions of goods to be produced;
- (e) the cost of production or supply;
- (f) production methods;
- (g) supplier and customer details;
- (h) location of suppliers and customers

Section 12(2)(a)-(f) on services provides that calling up orders may be made in respect of:

- (a) charges made, quoted or paid or to be made, quoted or paid for designation services offered or obtained;
- (b) terms and conditions of supply for services supplied or obtained or to be supplied or obtained;
- (c) extent or scale (if any) on which services are supplied or obtained or are to be supplied or obtained;
- (d) form or manner of services supplied or obtained or to be supplied or obtained;
- (e) cost incurred in making available, supplying or obtaining services;
- (f) customers or suppliers or locations thereof of services supplied or obtained or are to be supplied or obtained.

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(ii) Interpretation of Sections 7 and 12 RTPA 1976

Sections 7(1) and 12(1) cover agreements between, for example, X and Y to furnish Z with information; it need not simply be between X and Y. Thus Section 7 also applies to an agreement between parties to supply a central body or trade association i.e. the recipient of data need not be a party to the agreement.

The phrase "under which provision is made" causes difficulties in interpretation. It implies that an agreement, to be registrable, must be of a relatively formal, premeditated nature. The agreement must make provision for the exchange of information. X rings up Y and says "I shall be raising my prices 2% on Friday", Y replies "so shall I be" they then both put the 'phone down. If on Friday both X and Y raise prices by 2% there may not be a registrable exchange of information agreement concerning prices. There is certainly no agreement which makes "provision" for the exchange. It is of course possible that there is an "arrangement" to fix price level registrable under Section 6 (goods agreements). Irrespective of the provisions of Section 6, these words in Section 7 seem to exclude from registration informal, irregular telephone call exchanges of information. If such conduct is outside of the RTPA it would probably constitute "anticompetitive" conduct under the Competition Act 1980 (see Chapter 3).

The phrase "for or in relation" used in Section 7(1) and 12(1)(b) is very wide. An agreement between X and Y to exchange price data, for illustration, is an agreement under which provision is made "for" the exchange of information. If X and Y subsequently hire Z (perhaps an accountancy firm or computer programming partnership or firm of marketing consultants) to assist in collation and analysis of the data this presumably is an agreement "in relation to" the furnishing by two or more parties (i.e. X and Y) to each other of data listed in Section 7(1) or 12(2)(a)-(f) RTPA 1976. Likewise, if Z merely gave passive advice on how X and Y should analyse their data this would be an agreement in relation to the agreement between X and Y. The relationship between Z and X/Y need not be written to be caught by the Act; nor indeed need it be contractual. Section 43(1) RTPA 1976 defines agreement very widely to embrace all forms of consensus. (See Chapter 1 for analysis).⁹

In almost all matters listed in Section 7(1) and 12(2) information

provisions relating to past or future transactions are embraced. Both sections invariably use the past (quoted, charged etc.) and future (to be quoted, charged etc.) tenses. The sole exception is Section 9(1)(b) which relates to exchanges of information concerning "the price to be recommended or suggested as the prices to be charged or quoted in respect of the resale of goods supplied". Data exchanges of prices already recommended (i.e. past tense) may not therefore be called up and consequently need not be registered.

(iii) Statutory Instrument 1969 No. 1842: Information Agreements concerning goods which must be Registered

The only calling up order to date concerns goods.¹⁰ It may be reiterated that only those information agreements covered by this order need be registered: S.I. 1969 No. 1842 Article 3(1)(a) and (b) covers agreements concerning

- "(a) the prices charged or quoted or to be charged or quoted otherwise than to any of the parties to the relevant agreement for goods which have been or are to be supplied or offered or for the application of any process of manufacture to goods;
- (b) the terms or conditions on or subject to which goods have been or are to be supplied otherwise than to any such party or any such process has been or is to be applied to goods otherwise than for any such party."

Under Article 3(1)(a) (Prices), both pre-notification agreements whereby X and Y inform each other of price to be charged in prospective transactions and post-notification agreements whereby X and Y notify each other after conclusion of the transaction with the customer must be registered. Agreements for exchange of prices actually charged or merely quoted are not differentiated between. In these days of instantaneous communication an agreement whereby X and Y inform each other of prices quoted or charged during the transaction (i.e. simultaneous notification) is a possibility; are such agreements registerable? The answer is almost certainly yes since there will inevitably be a time lag - even if of only minutes - between charge or quotation and notification hence making the agreement "post-notification". The Order excludes agreements concerning prices paid or offered i.e., buyers agreements. Hence buyers may exchange price data without having to register their agreement.

Under Article 3(2)(b) (terms and conditions), no definition is given of a "term or condition" but presumably it means those provisions which impliedly or expressly, orally or in writing, are contained in

the contract of supply. Included would, inter alia, be: price quantities, descriptions, packaging and advertising obligations, periods allowed for payment, method of payment and credit facilities, discounts and rebates, freight handling and carriage costs and insurance liability clauses, exclusion and limitation clauses, renegotiation and escalation clause, date and place of delivery, checking etc. As with Article 3(1)(b) buyers agreements are excluded. Again agreements terms and conditions which have been or are to be applied are included. The same question concerning instantaneous notification applies and the same answer may be suggested.

S.I. 1969 No. 1842 is absurdly complex in its drafting. The following is a summary of those information schemes otherwise caught by Article 3(1)(a) and (b) but which are expressly excluded by the Schedule to the Order:

- (a) Agreements relating to exports which are not generally registerable in any event under Schedule 3 paragraph 6 RTPA 1976. Though UK export agreements to the EEC fall within Article 85(1) as do agreements to non-EEC states if they affect trade within the EEC.
- (b) Agreements relating to information furnished to a Government department or other specific authority listed in Part II of the Schedule.
- (c) Agreements whereby parties agree to separately and directly furnish a non-trading body (e.g., a trade association) with information which relates only to itself and where information based upon that furnished is returned only to that party.
- (d) Agreements whereby parties agree to separately and directly furnish information to a specified authority at the written request of that authority (e.g. Government department or other body listed in Part II of the Schedule) in a form that prevents the information being identifiable as relating to any particular party - though of course the party furnishing the data may recognise it.
- (e) Agreements relating to the furnishing of information already published or to be made public.¹¹ A similar conclusion seems to apply in respect of agreements under EEC law (see above).
- (f) Agreements relating to the furnishing of data as an incidental matter in agreements already excluded from registration under Sections 7 and 8 RTPA 1956 (covered now, in shortened

and consolidated form, in Section 9 RTPA 1976 relating to provisions in agreements to be excluded from the purview of the Act. See Chapter 2 for details).

- (g) Agreements entered into by an agricultural marketing board of a kind referred to in Section 45 Agriculture (Miscellaneous Provisions) Act 1968.
- (h) Where the only parties are the nationalised gas industries or the nationalised electricity industries. Though such agreements may be subject to Article 85 or 86 EEC if, because of their agreement, EEC trade is affected. Article 90 EEC makes public undertakings subject to Articles 85 and 86 EEC.

(iv) The Requirement of Two Parties: Whether Unilateral Disseminations are Caught

An information agreement is defined in Section 7 RTPA 1976 as being between "... two or more persons carrying on within the United Kingdom ... business...." Hence, where only one party furnishes information the Act is excluded. However, a practice where a single firm X regularly informs Y of his price intentions could fall under Section 2(1) CA 1980.

Under Section 2(1) CA 1980 (for analysis see Chapter 3) such a practice could constitute a "... course of conduct which ... has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition" The phrase "course of conduct" excludes 'one-offs'. Hence would a single, unilateral dissemination by X - a major supplier - to his major rival Y be a "course of conduct". A narrow view would be that an isolated instance is beyond the scope of the Act. However, if Y in any way responded to the data then such action coupled to the isolated dissemination might be enough to constitute a "course of conduct". Section 2(1) CA 1980 refers to "... a course of conduct which of itself or when taken with a course of conduct pursued by persons associated with him...." This seemingly implies that a course of conduct cannot be a joint activity it must flow from the activities of one firm. If this is so then the isolated dissemination of X is not subject to the CA 1980. An alternative analysis postulates that the single dissemination by X coupled to the behaviour of X in subsequently acting upon the conscious parallelism which results may be a "course of conduct". The activity in question would in this case be confined to X's actions alone.

If a single dissemination by X enabled Y to align his prices and thereafter act in conscious parallelism with X then this might comprise a "complex monopoly" under Sections 6-11 FTA 1973 entitling the OFT to refer X and Y to the Monopolies and Mergers Commission for analysis. A "complex monopoly" exists where a number of firms together control 25% or more of the market be that market for the whole of the United Kingdom or only a part thereof. Although, as noted above, "buyers" agreement are excluded from S.I. 1969 No. 1842 they are not excluded from either Section 2(1) CA 1980 nor the monopoly provisions of the FTA 1973.

(v) The Goods/Services Distinction

It is worth recalling that only information agreements concerning goods need be registered and then only those described in S.I. 1969 No. 1842. Businessmen may proceed with services information agreement without needing to register them. However, care should be taken that the information agreement is not simply part and parcel of an ordinary agreement which fixes prices, shares markets or imposes quotas etc. If this is the case the OFT may treat such agreements as an ordinary registrable agreement.

(vi) Summary: Types of agreement that are registrable

In the United Kingdom only information agreements concerning goods need be registered. Conceivably, an information agreement concerning services may be investigated by the OFT under CA 1980. There is however no published investigation on such practices to date.

Within the category of goods information agreements only those agreements which concern matters mentioned in S.I. 1969 No. 1842 need be registered, i.e. information concerning, prices and terms or conditions. Other types of information exchange are not registrable. Though, again, conceivably they could be made the subject of investigation under the CA 1980.

C. TYPES OF PRICE INFORMATION AGREEMENT

The exchange of price information is rarely acceptable to the OFT or the European Commission especially where the parties inhabit oligopolistic markets. In the past parties have argued that "open pricing" - a term first coined by Chicago lawyer A.J. Eddy in a treatise entitled "The New Competition"¹² - was beneficial to the market. Eddy described the practice as pricing "... that is open and above board, that is known to both competitors and customers, that is marked wherever possible in plain figures on every article produced, that is accurately in every price list issued - a price about which there is no secrecy, no evasions, no preferences. In contract work it means that every bid made and every modification thereof shall be known to every competitor for the order". Such a rationale has never been accepted in America¹³ where it was engendered nor in Britain or the EEC where it has not infrequently been rehearsed.¹⁴ The objections are: first, rarely if ever do information agreements make their data available to their customers; and secondly information agreements in oligopolistic markets can be anti rather than pro-competitive.

In this section "price information" is construed widely to include all elements and constituents of price: profit margins, discounts and rebates, invoice analysis, freight costs and other handling charges; labour, materials and other inputs which directly effect overall price. This is wider than the narrow definition given in Section 43(1) RPA 1976 which defines price as including "a charge of any description".

I. EEC Law

The following are examples of informational exchanges that may infringe Article 85(1) EEC:

(i) Pre-Notification Agreements

Pre-notification agreements are usually operated by trade associations who collect, collate and disseminate the data. In Re IFTRA Rules for Producers of Virgin Aluminium¹⁵ the Commission condemned a pre-notification on the basis that it gave "... the parties the means to know each others costs, and, particularly in view of the structure of the relevant market, [enabled] them to predict each other's price policy with greater certainty, whereby price competition [would] be diminished or eliminated".¹⁶ A more comprehensive condemnation was given by the Commission in European Glass Manufacturers¹⁷ to a pre-notification scheme of discounts from list prices:

"It is contrary to the provisions of Article 85(1) of the EEC Treaty for a producer to communicate to his competitors the essential elements of his price policy such as price lists, the discounts and terms of trade he applies, the rates and date of any change to them and the special exceptions he grants to specific customers.

An undertaking which informs its competitors of such elements of its price policy will only do so when certain that, in accordance with the agreement entered into with such competitors in pursuance of the [agreement], they will pursue a similar price policy for deliveries to the market where the undertaking is a price leader. By such means it is sought to eliminate the possibility of unforeseen or unforeseeable reactions by competitors, thus removing a large element of the risk normally attaching to any individual action in the market."¹⁸

As a rule all pre-notifications of pricing data agreements will infringe Article 85(1). In this context it should be noted that slightly different rules apply for steel and coal under the European Coal and Steel Community Treaty (ECSC) Article 60(2) ECSC obliges steel producers to publish price lists which are available to seller and buyers alike. However in other respects Article 65(1) ECSC mirrors Article 85 EEC.

(ii) Post-Notification Agreements

In practice the Commission refuses to differentiate between pre- and post-notification on the basis that subtle use of post-notification agreements can still give sellers the chance to predict accurately each others pricing policy.¹⁹ For an agreement to be innocuous the time-lag between transaction with customer and notification with competitor would have to be long enough to nullify the predictive value of the data to the competitor. Such a period will almost certainly have to be counted in months. The period would also have to be long enough to avoid the rival having a chance to undercut the person notifying. Such undercutting might be the design in a market sharing agreement: Where X has filled his quota of sales but Y has not notification of the price quoted to a customer and notified to Y before the sale is formally entered will allow Y to "steal away" that customer by undercutting X. In Flat Glass²⁰ the Commission imposed fines of between 765,000 ECU to 1,450,000 ECU (approximately £460,000 - £870,000) on glass manufacturers who exchange sales figures as a means of monitoring each others market share and thereby maintaining the status quo:

"The exchange of sales figures by the competitors served not only to keep them better informed of the general state of the market but also to allow them to monitor closely the sales of their main rivals so that they could react more effectively if this proved necessary. The exchanges thus helped the parties to ensure they maintained their relative positions within the planned fluctuation margin, for not only were the data which were exchanged very detailed, but the exchanges were frequent (quarterly) and they were the subject of discussions on interpretation and calculation methods."

Thus a three monthly exchange was too short a period to "sanitise" the exchange of sales data. The Commission invariably view post-notification price agreements as either hiding collusion or likely to foster conscious parallelism.

(iii) Exchange to Enforce Resale Price Maintenance

Such exchanges will be invariably unlawful: Competitors exchange customer lists; competitors learn, through absence from the list, that customer A is no longer being supplied by supplier X. This indicates that A has been departing from the stipulated resale price and X's refusal to deal must be supported by other competitors. In this manner the data exchange initiates a boycott of A and an enforcement/disciplining system for resale price maintenance. (See Chapter 8 for details)

(iv) Price Verification Schemes

The "Buyers Tales" problem: Dealer A receives a quotation of £100 per unit from Supplier X; he loses nothing by misrepresenting to Supplier Y that X has quoted him £90 per unit and that a matching or undercutting quote would secure Y the order. If X and Y exchange price data they can test the veracity of A's claims and ultimately eradicate "buyers tales" from the market. No formal decision has been issued by the Commission but a similar approach is apparently adopted to that of American law. The problem is not uncommon in the EEC.²¹ American law has derived primarily from the context of price-discrimination cases. The cases adopt variations on the following scenario:

Supplier Y quotes \$100 per unit in formal transactions; dealer A induces him to quote \$89 per unit in order to better a fictitious quotation from Supplier X. Other dealers learn of the \$89 quotation to A but when quoted \$100 per unit by Y complain that he is discriminating in price between his customers.²²

The legal problem is whether an agreement between suppliers to verify

each others prices is a legal method of countering buyers tales (which force them to quote unprofitably) and allegations of price discrimination. It is generally considered a justification for price discrimination that the low quotation was made in order to meet a rivals low bid.²³ In America the following conclusions would appear to prevail:

- (a) Where there is a clash between price-fixing law and price discrimination law the vitality of price-fixing laws must be maintained even at the expense of price-discrimination laws. Price-fixing is a more serious and widespread practice.²⁴
 - (b) The evidentiary burden of a "meeting competition" defense to a price-discrimination allegation may be satisfied by less than a regular exchange between rivals of prices quoted. The defense may be proven by the low quoting supplier simply demonstrating that the purchaser had quoted an artificial price to him and that he believed it. Alternatively suppliers can organise a trade association to disseminate anonymous ranges of prices quoted, perhaps broken down by area. To gain exemption for a trade association scheme under Article 85(3) EEC suppliers would have to satisfy the Commission that the practice of buyers tales was common, that customers were complaining and that suppliers were suffering financially as a result. It might well be only the truly exceptional case that earns an exemption. Perhaps where the customer is in a dominant or otherwise powerful position.²⁵
- (v) Anti-Dumping Complaints

The Commission has informally expressed concern that trade associations which have ostensibly been collecting price data for the compilation of an anti-dumping complaint have, in reality, used the dumping complaint as a smokescreen for a price cartel. "Dumping" occurs where undertakings in a non-EEC State sell in the EEC at prices below those prevailing on their own domestic market. Under Article 5 of Council Regulation 2176/84/EEC²⁶ trade associations may submit complaints to their national authorities or to the Commission. The complaint shall "contain sufficient evidence of the existence of dumping or subsidisation and the injury resulting therefrom". A proper complaint would necessarily involve close co-operation between trade association and members with respect to prices, costs, market shares, sales trends etc. Genuine complainants should ensure that the dossier they submit cannot be used to foster collusion; this would probably

involve screening procedures being adopted by the association.

(vi) Warning Mechanisms

Informational exchanges employed to warn confederates in a price fixing agreement that the Commission or some other authority has discovered their agreement or is investigating their premises will be viewed as proof of anti-competitive intent. In EEC law it may encourage the imposition of a fine. In one case parties agreed that in the event of an official visit a telex would be sent to competitors. The 'alarm' was: "Re IRMA. Attention Mr. _____ The figures from a German Company for the next market survey are wrong. They will therefore be distributed at a later date." The 'alarm over' telex would state: "Re IRMA. Attention Mr. _____ We have now received the correct figures from the German company. You will receive the market survey in a few days. Thank you for your comprehension."²⁷ The Commission commented: "The alarm system ... [makes] it clear that the parties were fully aware that their conduct constituted infringements of community competition legislation"²⁸

II. United Kingdom Law

(i) Pre and Post Notification Agreements

Both pre and post notification agreements must be registered under S.I. 1969 1842 Article 3(2)(a). The Restrictive Practices Court has been invariably strict with such agreements which are usually adjuncts to more formal price agreements,²⁹ though, in very exceptional cases such information agreements have been permitted to co-exist with a price-fixing agreement found to be in the public interest and hence legal.³⁰ However a considerable body of criticism has been levelled at these cases and it is by no means certain that the current court would be equally liberal.³¹ Certainly in everyday negotiation the OFT base their judgment on the stricter line of cases. This will be particularly so in concentrated markets. An analysis of the Restrictive Practices Register reveals that most information agreements specifying price would be unsuitable for Section 21(2) RPA 1976 representations since they are generally: (a) specific in identifying the supplier and customer involved; and (b) specific in identifying the prices actually involved in the transaction.³² To even stand a chance of being accepted an information agreement should be anonymous and its

data aggregated so that individual firms and transactions cannot be identified. Even where this is done the chances of success are slim. Thus, for price agreements to be acceptable parties would have to adduce evidence to the OFT of: a competitive market with no oligopolist tendencies amongst participants; positive benefits to the market being conferred by the agreement; use of aggregated data presented in anonymous form. Only then could restrictions be said to be not "significant" thereby enabling Section 21(2) dispensation to be sought. An example of a case actually satisfying these criteria is Banbury Marketing Services³³ which concerned mushrooms. The market for mushrooms is characterised by a large number of growers varying enormously in size. The product is fungible, it has a very short post-harvesting life and must be marketed within forty eight hours. The short-lived nature of the product; the often-small size of the producers; and, the unpredictable nature of demand rendered the operation of the market somewhat inefficient. The exchange of information concerned was designed to "perfect" the market by providing the six participants with improved information of prevailing price levels in the market centres around the United Kingdom and of the level of demand experienced at those centres. Under the system a number of wholesalers in all the various markets were contacted daily and data (some rather anecdotal) on: quantities received, quality, price levels, strength of demand, and likely supply levels for the following day, was obtained. The participants would then telex or phone in to a centre in Banbury their expected daily despatches to the various markets by grade. This supply data would then be summarised and the results disseminated to the participants with comments on apparent over or under-loading on individual markets. Each participant was then free to reassess the situation and reallocate supplies. The agreement was given Section 21(2) dispensation by the OFT. A number of points are worth stressing: (a) the parties did not fix prices they merely exchanged data on existing price levels and demand patterns in different locations; (b) all data was disseminated in summary form; (c) no data concerning a party was disclosed to other parties; (d) the collation centre did not recommend parties to undertake specific courses of action, parties retained total freedom to choose how they acted upon the data; (e) the agreement may reasonably be expected to have served the consumer by improving the continuity of supply to markets and by

reducing the risk of wild price fluctuations. The OFT undertook an analysis of the market, they apparently accepted the view that collusion is difficult where the product is not homogeneous (mushrooms come in different grades) and speed of marketing is essential. The strength of competition to the parties was also a significant factor.

(ii) Price-fixing Surrogates

Price-fixing agreements unearthed by the OFT are often referred to the Restrictive Practices Court for a formal prohibitive order despite the fact that the parties have abandoned the agreement and do not defend themselves before the Court. Firms subject to a court order (see Chapter 5 for discussion) may not enter agreements to the "like effect". They may not therefore enter price information agreements as surrogates for price-fixing agreements. In this respect the Court has stated: "We wish to give warning It is abundantly apparent ... that those who, having been placed under an injunction or having given an undertaking ... thereafter exchange information of their intentions on matters such as prices, or partake in discussions, formal or informal, with their competitors on such matters, may be in real peril of ... having passed easily and quickly from that which may be legitimate into actions which constitute a grave contempt."³⁴

(iii) Exchanges to Enforce Resale Price Maintenance

As with EEC law an exchange of data designed to enforce resale price maintenance can expect no sympathy from the OFT. Section 11 of the Resale Prices Act 1976 prohibits the withholding of supplies to dealers who undercut suppliers stipulated prices. Agreements to collectively refuse to deal are, a fortiori, anticompetitive and will be strictly condemned by the OFT. Moreover, collective action of this variety will probably amount to the common law tort of causing loss by unlawful means. A person suffering thereunder may sue for damages and/or an injunction. The unlawful means is the infringement of the Resale Prices Act and/or the RTPA 1976.³⁵

(iv) Price Verification Schemes

Similar conclusions to those derived from EEC law may be assumed to apply.³⁶ A dominant buyer who employs misrepresentation as a tactic might be subject to investigation under Section 2(1) CA 1980.

(v) Anti-dumping Complaints

As noted in respect of EEC law complaints may be made to national authorities for transmission to the Commission. A sham complaint which hides a price-fixing or market sharing etc. agreement would be treated as a registerable agreement and assessed as such. The agreement would not benefit from the exemptions from registration granted by Part I of the Schedule to S.I. 1969 No. 1842(2)(a) and (b)(ii) to information agreements for furnishing specified authorities with information since it is not: (a) submitted by the parties "separately and directly to the specified authority"; and/or (b) submitted to the authorities "at the written request of the authority"; and/or (c) submitted in a form which "prevents any information being identified except by the party to whom the information relates".

(vi) Warning Mechanisms

See the commentary in respect of EEC law above. Similar conclusions should apply in the UK though of course the OFT have no power to fine.

D. DETECTING ANTI-COMPETITIVE PRICE EXCHANGES:
EEC AND UNITED KINGDOM

The following factors may be used to detect exchanges of price data.³⁷ It will be appreciated that the factors below are similar to those often used to detect straight price-fixing agreements. Clearly, this is because price data agreements may be closely related to price-fixing agreements.

- (i) Is there an agreement to abide by published price lists? An affirmative answer suggests collusion over price.
- (ii) Are details of price offers exchanged between the parties even though actual sales may not be made at the offered price? This helps ensure uniformity.
- (iii) Are individual buyers and sellers identified in the exchanged or disseminated data? Where anonymity is not the rule parties who breach the agreement e.g. by not abiding by a rivals notified price, may easily be detected and pressure to comply exerted by other parties or a central trade association.
- (iv) Is disseminated data made available to buyers or their trade associations? The Commission has frequently complained of one-sided agreements.

- (v) Are competitors books open to inspection by each other? An affirmative answer suggests collusion.
- (vi) Is there a delay between conclusion of a transaction and notification to competitors or the trade association? The shorter the time-gap the greater the implication that the data is intended for price co-ordinating purposes.
- (vii) Is information on prices to be charged notified to the trade association i.e. before it is notified to the customer? Pre-notification suggests a concerted attempt to harmonise prices.
- (viii) To what extent do buyers find that on placing an order quotations of the price by the seller may be delayed for a few days? Where delays exist this might be because the seller must confirm his prices with competitors.
- (ix) To what extent do buyers find that prices quoted to them vary very little between sellers? Where competition should be fierce such uniformity suggests collusion.

E. CONTRACT TERMS AND CONDITIONS -
EEC AND UNITED KINGDOM

Contractual terms and conditions are important ingredients of competition especially in oligopolistic markets or other markets where price tends naturally to be uniform. There, the only competition remaining in existence may focus upon terms and conditions of supply. Exchanges of information on supply terms and conditions are registrable in the United Kingdom³⁸ and, of course, are subject to Article 85(1) EEC. Such agreements where they tend to lead to the standardisation of contractual terms and conditions may be anticompetitive. In this section terms and conditions include any aspect of the supply contract which purchasers view as important i.e. to what extent would a customer choose supplier X over supplier Y because the former's contract terms are preferable despite the fact that X and Y quote a similar price. Examples of such terms/conditions would include: quantities, descriptions, packaging and advertising, periods allowed for payment, methods of payment and credit facilities, discounts and rebates, freight handling and carriage costs and insurance, liability clauses, exclusion and limitation clauses, renegotiation and escalation clauses, date and place of delivery, checking and return of defective items etc.

In examining an exchange of such data the authorities will:

- consider how important the clause is to customers;
- consider the extent to which competition in that industry is price related or whether terms and conditions of supply are very important;
- consider the degree of concentration in the market; the more oligopolistic in characteristics the market the less sympathetic the approach;
- attention will also be paid to the desires of customers; many trade associations have negotiated standard form contracts with customers trade associations. In such cases the authorities will recognise that customers may well be able to take care of themselves;
- preferably, exchanged data should wherever possible be in anonymous and aggregated form.

It is not intended to examine every type of contract term or condition since the rules above cover the official approach to such data. It may, however, be noted that contract terms and conditions which have a direct bearing upon price will rarely be acceptable.³⁹ Thus exchanges of discount and rebate terms should be avoided. Similarly exchanges on common credit terms are of dubious legality; if X and Y charge uniform prices but X allows customers six months to pay and Y only 2 months then X's real price undercuts that of Y; a customer of X can offset the 6 months' interest he earns on the purchase amount against the purchase price.⁴⁰ This section may be concluded by a general statement of Commission policy:

"... the organised exchange of individual data from individual firms, such as figures on quantities produced and sold, prices and terms for discounts, higher and lower rates, credit notes and general terms of sale, delivery and payment, will generally be regarded by the Commission as practices which have as their object or effect the restriction or distortion of competition within the common market, and which are therefore prohibited."⁴¹

A reasonably strict approach may likewise be expected from the OFT so that Section 21(2) dispensation will rarely be appropriate. (See Chapter 11 for general analysis of terms and conditions)

F. GENERAL MARKET DATA

Firms have a legitimate interest in seeking to improve efficiency by the increase of relevant knowledge. Where efficiency is enhanced and lower costings and other benefits are passed on to the consumer Article 85(3)

might be satisfied if the agreement is registrable the OFT might be prepared to obtain Section 21(2) dispensation for the parties.

In this section the data disseminated and exchanged pertains to the general market rather than to the contract specifically. Included in this very important category are: cost analysis, turnover analysis,⁴² technical product data, cost of entry and exit data; investment data, advertising information, process and time, demand data, stocks and inventories etc.

Exchanges of such data amongst small and medium sized firms in competitive, unconcentrated markets helps to improve competitiveness and efficiency. Conversely the same exchange in concentrated markets with homogeneous products can encourage conscious parallelism and lead to the downfall of competition. The nature of the market will thus largely determine the legal position.

I. EEC Law

(i) Inter-firm Comparisons

Trade associations of buyers and sellers often collect, collate and disseminate market data to members. The form of the dissemination is all important in competition law. Data should be aggregated and anonymous. This prevents any member being able to identify specific statistics relating to individual competitors in the data. Where such identification is possible the data may allow competitors to predict rivals behaviour and may no longer be viewed as simply of educational value. A common form of dissemination is the inter-firm comparison whereby for each function (turnover, demand, costs etc.) the association disseminates data upon the average and the first and third quartiles. This data allows members to assess their own performance: they may compare the figures for their own firm against those of the industry as a whole. For an example consider that the fuel costs of X are £5,000 per annum. The data disseminated to him by his trade association gives three figures which are based upon data given to it by 100 firms:

1st Quartile - £3,800 (i.e. the average figure for the first 50 firms)

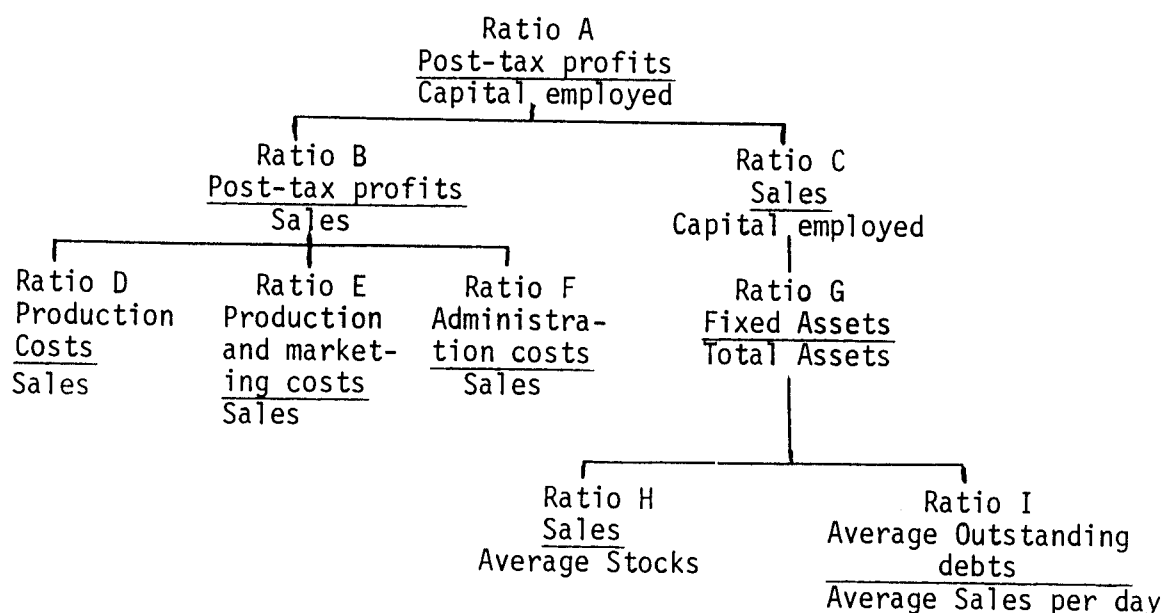
Median - £5,500 (i.e. the average figure for all 100 firms)

3rd Quartile - £7,600 (i.e. the average figure for firms 51-100)

X learns that his fuel costs are better than average but not as good as a number of other firms. In the ranked list of 100 firms, X would probably be approximately 45th. More elaborate systems commonly employ business ratio pyramids whereby the comparison consists of the drawing

up of a pyramid of ratios (see the diagram below). Each firm is given its figures in respect of the ratio thus allowing it to assess its performance vis-a-vis rivals. First and third quartile figures are often given. The system satisfies the requirements of aggregation and anonymity. The dissemination should NOT be accompanied by analysis or commentary or backed up by trade association meetings to discuss the results.⁴³ Firms should be allowed to draw their own conclusions. In America businessmen are advised to walk out of association meetings where clear attempts are being made to foster concerted behaviour. Disassociation in public from such activities is considered to be a method of avoiding the heavy penal sanctions of American law - a similar approach may be desirable in the EEC where fines can be very heavy on individual firms. Indeed, some legal counsel already advocate the strategic walking out of "dangerous" trade association meetings. Trade associations whose members are economically powerful must expect close Commission supervision. Such a system must be notified to the Commission. The time period between disseminations should be reasonable: three monthly publications for example provide less scope for collusion or conscious parallelism than bi-weekly issues. Though in Flat Glass⁴⁴ the Commission considered three monthly exchanges far too frequent. Parties were fined very heavily for even exchanging sales data which led to market sharing.

Example of Business Ratio Pyramid



The Commission Communication on Co-operation agreements permits the joint carrying out of comparative studies of enterprises and industries but gives the familiar caveat that if it leads to concerted or consciously parallel behaviour it may violate Article 85(1) EEC. Moreover, that this might especially be the case in oligopolistic markets.⁴⁵ The Commission has condemned disseminations of costing, and production date where it has been individualised (i.e. not aggregated or anonymous) and confined only to sellers in concentrated markets.⁴⁶

(ii) Non-Comparative Global-Industry Data

Data relating to the whole industry raises many problems. The list below may be used as a guide to the Commission's response to various common data types:

- (a) Investment data: Pre-notification of investments to competitors has been objected to by the Commission. Thus an agreement whereby X notifies Y of his intention to increase capacity⁴⁷ or whereby A consults with B leading to the joint reduction in investment as a means of reducing capacity and thereby keeping prices stable⁴⁸ or whereby X consults with Y over the extent of the increase or whereby X asks Y's permission to expand capacity,⁴⁹ will infringe Article 85(1) EEC. A similar prohibition applies to the construction of new plant in another EEC state.⁵⁰ However, in certain circumstances investment agreements are acceptable. Thus, where an agreement is needed to prevent the establishment of capacities exceeding the load limit of the market exemption under Article 85(3) may be available. This is particularly true for investments where input costs are very high but demand fixed or at least relatively static.⁵¹ The mere exchange of investment data in such market conditions would, a fortiori, be legitimate.⁵² Likewise the simple discussion of market outlook and production capacity is legal provided the discussion does not lead to recommendations on investment.
- (b) Product Specifications: The exchange of product data may of course lead to an improved quality product. However, if it leads to product standardisation which reduces consumer choice and provides a more uniform cost basis for suppliers to co-ordinate prices upon then it will breach Article 85(1) EEC. In America the standardisation of the quantity of a scarce and expensive ingredient in a

product was held to infringe the antitrust laws.⁵³ Nonetheless, the Commission has exempted trade associations undertaking research and dissemination of results into how products may best meet statutory health requirements.⁵⁴

- (c) Costs of Entry data: The exchange of such data should rarely cause problems. Potential entrants may obtain such data from official statistics or existing companies annual reports or from their own commissioned market reports. A trade association that deliberately misleads potential entrants about entry costs as a device to keep them out might be in breach of Article 85(1) EEC. No formal decision has been made in this respect.
- (d) Demand: Evidence of demand derived from comparisons of output against orders or shipments, inventory levels, extent of unfilled orders or idle capacity etc. may be exchanged legitimately. This will not be legal if the exchange is intended to prevent firms from making competitive efforts to achieve a greater market share.⁵⁵
- (e) Supply Sources: Trade associations which discover and disseminate to members data on best sources of supply, new products and best buys but leave purchasing decisions up to members do not infringe Article 85(1).⁵⁶
- (f) Process: Informational exchange on R & D methods and results is examined in Chapter 12. Brief mention should be made of pre-notification of new inventions/models agreements. If the period between notification and commencement of first marketing is long enough to enable competitors to adjust their marketing policies or even their product lines an infringement of Article 85(1) EEC might result. Such agreements curb the competitive advantage an inventor would have by unannounced introduction of a new product.
- (g) Credit Information: Credit information creates many problems in practice. Standardisation of contractual credit terms is usually viewed as analogous to price-fixing; dissemination of credit data designed to foster standardisation will accordingly be viewed strictly. Any attempt by firms to use the exchange of credit data as a means of enforcing a blacklist or stoplist will be unlawful and probably punishable by a fine.⁵⁷ (See Chapter 11 for further details)
- (h) Vertically Imposed Obligations i.e. Supplier-dealer: The Commission has permitted suppliers to require their dealers

(wholesalers and/or retailers) to notify them of general business conditions, sales trends, stocks etc.⁵⁸ It does not matter if the supplier incidentally learns about rival suppliers and products through the notification of such information.⁵⁹ However, if the supplier requires the dealer to notify him specifically about his rivals trade this would be unacceptable.⁶⁰

- (i) The joint establishment of economic analysis and structural analysis centres does not cause competition law problems e.g. joint analysis of world markets, exchange rate fluctuations, cost of living increases etc.⁶¹

II. United Kingdom law

Article 3(2)(b) of S.I. 1969 No. 1842 requires information agreements specifying terms/conditions to be registered. Excluded from the order however are information agreements concerning general market data. Where parties conclude such an agreement but which also covers either price or terms/conditions it must be registered unless all registrable provisions are deleted. The dividing line between terms/conditions and general market data may sometimes be very fine. The OFT do assess provisions which they consider may be defined as price or terms/conditions agreements or which affect price or contractual terms and conditions.⁶² The analysis of such provisions and the problems they raise follows the EEC line and reference to commentary thereon may be made. Special reference may be made of credit data. Use of credit lists to operate a stop list will be illegal and will almost certainly be a common law tort of causing loss by unlawful means.⁶³ The OFT discourage credit reporting by trade associations. First, since such schemes can be legally problematic it is best to leave them to the professional credit reporting companies which exist; Secondly, where a customer has been listed on a credit list as having been convicted of a criminal offence and credit is denied to him accordingly the listing might not take account of the Rehabilitation of Offenders Act 1974. This provides that convictions for offences in respect of which the offender has received a sentence not exceeding 30 months imprisonment and where a specified time varying from 5 - 10 years (depending on sentence) has elapsed since the conviction, shall be treated as spent i.e. never having taken place. Section 4(3)(b) of that Act provides that a spent conviction shall not be a proper ground for "... dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in

any occupation or employment". Thus, a trade association may not justify blacklisting a person with a spent conviction. Thirdly, given that credit reports often list persons with criminal records and that errors may be made in the listing, it is defamatory to impute a crime to someone by erroneously incorporating their name on the list.⁶⁴ (See on credit terms, Chapter 11)

G. REFUSAL TO DISCLOSE INFORMATION

Firms are, as a general rule, under no obligation to disclose confidential data relating to their technology or business methods. Indeed, much of this chapter operates upon the premise that such disseminations may be unlawful. However, it is becoming clear that certain firms in a dominant economic position may have an obligation not to withhold information from competitors where those competitors have become economically and commercially reliant upon the dissemination of that data.

I. EEC Law

(i) Case law: IBM Settlement

The failure to disseminate information question arose in the IBM Settlement⁶⁵ case. The Commission considered that IBM was in a dominant position in the market for main-frame computers. IBM is naturally also very powerful in the market for plug compatible accessories to their computers. Other manufacturers also produce equipment that may be attached to the IBM computers. However to be able to manufacture this equipment effectively rivals need to know details of the interfaces of IBM machines. The interface is the logical and physical interconnection point between a computer and other machines. Interface data thus allows machines to "speak to each other". Traditionally IBM disclosed such data. However, when, as a matter of commercial strategy, they decided to refrain from disclosure, manufacturers of plug compatible equipment complained to the Commission. Following protracted and complex negotiations the Commission settled with IBM and hence a formal decision holding that IBM had abused its dominant position was not issued. Under the terms of the settlement IBM agreed to make available information on the interfaces to hardware products, four months prior to date of announcement of the product concerned. IBM were not required to disclose unique interfaces which

could reveal product design. Indeed, IBM do not have an open duty to disclose interface data, those applying to IBM for data must enter an 'information disclosure agreement' the terms of which may be summarised as follows:

- (a) requester must represent and upon request provide satisfactory evidence that it is established and doing business in the EEC; and, that it is a company which develops and manufactures products of a relevant type for which he asks interface information;
- (b) limitations on disclosure to third parties include restrictions on disclosure to third parties prior to general availability other than confidential disclosure to employees or subcontractors (the latter may be required to sign the same agreement).
- (c) any competing undertaking seeking interface data from IBM must be prepared to disclose corresponding data to IBM on the same terms;
- (d) fees and royalties based upon usage will be payable on: external licenses, IBM's normal licenses, established copyright program licenses, and, licenses for other proprietary information protected by any legally enforceable right;
- (e) patent rights are not waived;
- (f) restrictions on usage and copying of source-codes will be imposed;
- (g) parties requesting data from IBM will be required to pay reasonable costs for reproduction and dissemination of information;
- (h) the agreement will also provide for penalties for breach of the agreement of any IBM patent or copyright.⁶⁶

(ii) General relevance

The withholding of proprietary information may be anticompetitive where the possessor of the information is dominant, where the possessor has in the past disclosed such data, and where rivals or other firms have evolved in reliance on that data. The position in EEC law is less certain where rival firms are denied access to information that has never hitherto been disclosed. The Commission never issued a formal decision in the IBM Settlement case so that the detailed reasoning behind their position is not available for analysis. However, it is arguable that there is a difference between firms which blow hot and cold, i.e. disclose then cease to disclose, and, firms which have never disclosed. Another important factor may be the

extent to which firms in the market have become technologically interdependent with the dominant firm. In the IBM case rival manufacturers were dependent upon IBM interface data because it enabled them to manufacture plug-compatible accessories efficiently. Thus, the extent to which the dominant firm has made past disclosures; the extent to which rivals have relied upon these disseminations; and, the degree of technological interdependence may all be relevant factors in such cases. In all cases the extent to which substitutes for the information are available would also appear to be relevant.

II. United Kingdom Law

The OFT could investigate a refusal to supply information by an economically powerful firm under the CA 1980. Guidance may be found in two cases involving the refusal to grant copyright licenses.⁶⁷ In Ford Motor Company: Licensing for the Manufacturer or sale of replacement body parts⁶⁸ the OFT stated:

"Copyright confers on one person (the owner of the right) the exclusive right to control the supply of a particular good (a good made to the registered design of the owner or copies from work in respect of which he owns the artistic copyright) and to prevent all unauthorised persons from supplying that particular good to the market. To the extent that this right is exercised competition in the supply of the good in question is restricted. Prevention of other persons from supplying a particular good is, however, unlikely to amount to an anti-competitive practice in markets where there are substitutes for the good or where substitutes may be freely developed by others.

The effects on competition thus arising from the exercise of copyright depend on the market in which the particular good is supplied. Where there are reasonable substitutes for the particular good or alternative designs or developments can be made, the exclusive rights of supply do not confer monopoly rights in the market and the exercise of copyright is unlikely to have an anti-competitive effect."

Thus, upon this basis, the refusal to license information may be anti-competitive where the information is not reasonably attainable from other sources which is likely where the possessor of the information enjoys a dominant position. In the Ford case the failure to license was in respect of the drawings or designs for body parts for Ford vehicles. It is pertinent to note that Ford traditionally accepted that other producers were manufacturing Ford spare parts. It was the sudden change of policy and the subsequent attempt to prevent this production that was the cause of complaint. In another case the OFT have concluded that failure to license copyright could be anti-competitive even where there was no history of dissemination where the failure created artificial entry barriers.⁶⁹ For further details of these cases see Chapter 13 in the section on Copyright.

H. SPECIMEN COMPLIANCE SCHEME

A number of trade associations and International Federations of trade associations employ competition law compliance schemes. The following is an example of various schemes that have been used in Europe by various heavy industry trade associations. Often such rules are formalised by incorporation into constitutional documents or ratified by a governing board.

- Rule 1 Members of the Secretariat's staff may not reveal the exact or approximate data on any company, and may not disclose the relative position of any company as shown by data submitted to the Secretariat.
- Rule 2 No person, except those members of the staff specifically assigned for this purpose, shall be permitted access to the data submitted by individual companies for inclusion in statistical reports.
- Rule 3 Statistical summaries or totals for particular items on statistical summaries shall not be released if it is probable that the data of any particular company would be disclosed through such a release. In particular this regulation shall be deemed to preclude the release of any summary, or of any particular item on any summary where:
- a) There are less than 4 companies participating; or

- b) There are 4 or more companies reporting and the figure from one company is more than 60% of the total.⁷⁰
- Rule 4 No data on prices, discounts and rebates, or invoices will be disseminated.
- Rule 5 No comments, analysis, observations, or recommendations regarding the results of the programme will be made. Each company is to make its own analysis of the statistics.
- Rule 6 Participation in the statistical programme should be open to all Western European producers.
- Rule 7 Participation in the statistical programme by members shall be entirely voluntary. Any members may decline to participate and concurrently, no member may be refused the right to participate.
- Rule 8 Each individual company report of statistical data shall be destroyed upon incorporation of the data in a statistical report and upon determination of the Secretary General that retention of the report is no longer necessary to ensure the accuracy of the statistics.
- Rule 9 Each sponsor of a statistical activity shall have the responsibility for determining the distribution of summaries, subject to the following:
- a) One copy of each summary shall be sent to each company whose data is reflected in the report.
 - b) One copy of each summary shall be retained on file in the Secretariat where it shall only be made available to interested persons if the concerned sector groups deem it desirable.
- Rule 10 Company's submission will be under code number and, only if requested, under company's name.

FOOTNOTES

1. See e.g. Zinc Producer Group O.J. 1984 L220/27 at p. 30 para. 19; Woodpulp O.J. 1985 L85 Commission fined 40 producers of market woodpulp located in the USA, Canada, Sweden, Finland, Norway, Portugal and Spain. The infringements of Article 85 comprised detailed exchanges of information designed to stabilise prices. It is relevant to note that none of the firms had their headquarters within the EEC though they all regularly did business within the EEC.
2. J.O. 1968 C75/3; [1968] C.M.L.R. D5.
3. *ibid.*, at para. II(1).
4. See Seventh Commission Competition Report (1977) pp. 18-21 points 5-8: "In assessing information agreements the Commission pays close attention to the structure of the relevant market. The tendency for firms to fall in line with the behaviour of their competitors is particularly strong in oligopolistic markets. The improved knowledge of market conditions aimed at by information agreements strengthens the connection between the undertakings, in that they are enabled to react very efficiently to one another's actions, and thus lessens the intensity of competition" (*ibid.*, at p. 20 point 7(2)). See also (Cases 40-48, 50, 54-56, 111, 113, 114/73) Sugar Cartel [1975] E.C.R. 1663 at p. 1942 paras. 173, 174 where the Court makes a similar objection to oligopolistic agreements.
5. [1977] 2 C.M.L.R. D28.
6. *ibid.*, at pp. D36, 37 para. 30.
7. See e.g. Community v. Associated Lead Manufacturers [1979] 1 C.M.L.R. 464 at p. 473 para. 26; VNP & COBELPA [1977] 2 C.M.L.R. D28 at p. D36 para. 28: "The undistorted competition aimed at by the EEC Treaty is incompatible with an artificially created market situation in which abnormal standards of information and market stability eliminate certain competitive risks; this is all the more so where the benefit of the artificial improvement in market information accrues solely to the seller ... and not to the buyer."
8. Under Section 7(5) RTPA 1976 the Secretary of State must, before laying before parliament the draft of an Order under Section 7(1) RTPA 1976 publish in such manner as he thinks fit appropriate a notice describing the classes of information agreement to which the proposed order would apply and specifying a period, which may not be less than 28 days, within which representation concerning the proposal may be made to the Secretary of State. These representations must be "taken into consideration". S.I. 1969 No. 1842 was made on 18 December 1969 and came into force on 1 February 1970.
9. See, Section 43(1) RTPA 1976 under which "agreement" includes an "arrangement" whether or not it is intended to be legally binding. The term "arrangement" has been construed to include all informal and vague agreements between parties intended to be acted upon. See, British Basic Slag Ltd.'s Application (1963) L.R. 4 R.P. 116 at pp. 154, 155 per Diplock L.J. (C.A.).

10. Ordinary agreements relating to services are subject to registration however under S.I. 1976 No. 98 Restrictive Trade Practices (Services) Order 1976.
11. Part I(2)(C) of the Schedule gives as an example: "... the furnishing of particulars of prices charged for goods at any market or other place at which such goods are regularly offered for sale by a substantial number of sellers."
12. Eddy, *The New Competition* (New York, 1912).
13. See e.g. American Column & Lumber Co. v. U.S. (1921) 257 U.S. 377; U.S. v. American Linseed Oil Co. (1923) 262 U.S. 371; Sugar Institute Inc. v. U.S. (1936) 297 U.S. 553; but c.f. for cases where "open pricing" was upheld, Maple Flooring Manufacturers v. U.S. (1925) 268 U.S. 563; Cement Manufacturers Protective Association et al v. U.S. (1925) 268 U.S. 588; Tag Manufacturers Institute v. F.T.C. (1949) 174 F. 2d 452.
14. See e.g. Dutch sporting cartridges Third Commission Competition Report (1973) point 55; Dutch agreement in the record industry Fourth Commission Competition Report (1974) point 76; OFITOMEF, Bull E.C. 12/1976 No. 2127; VVVF [1970] C.M.L.R. D.1; Non-Ferrous Semi-Manufacturers Fifth Commission Competition Report (1975) point 39; Ships Cables Fifth Commission Competition Report (1975) points 40, 41.
15. [1975] 2 C.M.L.R. D.20. See also OFITOMEF Bull E.C. 12/76 No. 2127.
16. *ibid.*, at p. D.36 para. 43.
17. [1974] 2 C.M.L.R. D.50.
18. *ibid.*, at p. D.71 para. 43.
19. *ibid.*, at p. D.71 para. 42(ii); Community v. Associated Lead Manufacturers Ltd. [1979] 1 C.M.L.R. 464 at p. 472 paras. 24 et seq.
20. O.J. 1984 L212/13 at pp. 19, 20, para. 45. See at para. 47 for the Commission's assessment of the effect on trade between the Member States. In Nuovo Cegam [1984] 2 C.M.L.R. 484 the Commission granted an Article 85(3) exemption to an association of engineering insurers which collected statistical data on claims experiences from members. This data was used to draw up a common tariff of basic premiums for various types of risk which the members agree to apply. Members retained freedom to add to the basic premium margins for expenses, commission and profit etc. The agreement clearly had the effect of harmonizing prices. However the agreement was exempted under Article 85(3) on the basis that the market in Italy for this type of insurance operated inefficiently, it was characterized by weak demand and relatively limited supply. To do business the insurer required highly specialised resources and knowledge. The Commission stated, in respect of Article 85(3) that the agreement by enhancing the efficiency of members improved the production and distribution of insurance services and promoted technical and economic progress. Consumers could be said to have obtained a fair share of the resulting benefit since the promotion work of the association helped to enlarge the capacity of the industry and could lead to a technically more advanced product on terms competing with those of other operators in the market (*ibid.* at p. 493 paras. 19, 20). See the Commission comment on this case Fourteenth Commission Competition Report (1984) at p. 68 para. 76.

21. See e.g. OFITOMEP Bull E.C. 12/76 No. 2127. European Glass Manufacturers Agreement [1974] 2 C.M.L.R. D.50 at p. D.71 para. 41(ii) last sentence.
22. See LCL Theatres Inc. v. Columbia Pictures Industries Inc. 421 F. Supp. 1090 (N.D. Tex 1976) modified 566 F. 2d. 494 (5th Cir. 1978) where the false quotation was considered to be fraudulent.
23. In America the "meeting competition defense" is statutorily enshrined in Section 2(b) Robinson-Patman Act 1936. This provision allows suppliers to defend against allegations of price discrimination "... by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor."
24. See, U.S. v. U.S. Gypsum Co. 346 F.2d. 115 (1977) aff.'d., 438 U.S. 422 (1978); Automatic Canteen Co. v. F.T.C. 346 U.S. 61, 73 S.Ct. 1017 (1953) confirmed in Great Atlantic & Pacific Tea Co. v. F.T.C. 99 S.Ct. 925 (1979). A number of older cases, however, suggest that the burden of proof for the "meeting competition" defense was strong enough to require suppliers to show conclusive evidence of misrepresentation by the customer by means of price verification. For examples of such cases which have apparently been overtaken by the cases supra, see, Cement Manufacturers Protective Association v. U.S. (1925) 268 U.S. 588; Wall Products Co. v. National Gypsum Co. 326 F. Supp. 295 (N.D. Cal. 1971) and the petroleum cases in which major oil corporations conferred with rivals during a price war to verify its rival's prices before granting temporary price concessions to its own local retailers, Webster v. Sinclair Refining Co. 388 F. Supp. 248 (S.D. Ala. 1971); Belliston v. Texaco 455 F. 2d. 175 (10th Cir.) cert. denied 408 U.S. 928, 925. Ct. 2494 (1972); Gray v. Shell Oil 469 F. 2d. 742 (9th Cir. 1972) Cert. denied 412 U.S. 932, 93 S. Ct. 2773.
25. For American Cases supporting this conclusion see U.S. v. U.S. Gypsum Co. 346 F. 2d. 115 (1977) aff'd 438 U.S. 422 (1978); Great Atlantic & Pacific Tea Co. v. F.T.C. 99 S. Ct. 925 (1979). These overrule earlier cases demanding a very high burden of proof i.e., that the supplier had grounds which would lead a "reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low prices of a competitor". F.T.C. v. A.E. Staley 324 U.S. 746 at pp. 759, 760. See also Viviano Macaroni Co. v. F.T.C. 411 F. 2d. 255 at pp. 259, 260 (3rd Cir. 1969).
26. O.J. 1984 L201/1 (30 July 1984) on protection against dumped or subsidized imports from countries not members of the European Economic Community. For dumping procedures in respect of steel and coal see Commission Recommendation 2177/84/ECSC O.J. 1984 L201/7 (30 July 1984).
27. I.R.M.A. O.J. 1983 L 317/1 at pp. 6, 7 (15.11.83).
28. ibid., at L317/13 para. 54.
29. See e.g. Glazed and Floor Home Trade Association's Agreement (1964) L.P. 4 R.P. 239 where the Court upheld the price-fixing agreement but condemned the exchange of information; Mileage Conference Group of the Tyre Manufacturers Conference Ltd. Agreement (1966) L.R. 6 R.P. 49; [1966] 1 W.L.R. 1137; Galvanised Tank Manufacturer's Associations

29. continued
Agreement (1965) L.R. 5 R.P. 315; [1965] 1 W.L.R. 1074 where the Court condemned a post-notification agreement employing a two day time-lag; Crane Maker's Association Agreement (1965) L.R. 5 R.P. 264; [1965] 1 W.L.R. 542.
30. See e.g. Standard Metal Window Group Agreement (1962) L.R. 3 R.P. 198; [1962] 1 W.L.R. 1020; Permanent Magnet Association's Agreement (1962) L.R. 3 R.P. 119; [1962] 1 W.L.R. 781.
31. See e.g. Stevens and Yamey, The Restrictive Practices Court (1965) pp. 211-218; Hunter, Competition and the Law (1966) p. 126; O'Brien and Swann, Information Agreements Competition and Efficiency (1968) pp. 144-147.
32. c.f. The following exempted cases on the Register of Restrictive Trade Practices: No. 838, Midland Hosiery, Dyers and Finishers Association involving notification of price lists to the trade association and notification of changes thereto not before notification to customer but before application of modification; No. 729, Linoleum Manufacturers Agreement, exchange of data on general terms of payment, cash discounts, dating of invoices, carriage and delivery charges, other services costs; No. 390, Pin and Allied Trade Association Agreement, exchange of detailed price data; No. 2904, Association of Master Plumbers and Domestic Engineers (London), voluntary exchange of data price lists for plumbing materials - such an agreement would have little impact upon prices if labour costs were not also exchanged. See also O.E.C.D. Report on Information Agreements (1967) p. 21, Linen Sewing Thread Manufacturers Association Agreement - a term of the agreement stated: "In the event of any sales being affected by a participating member at prices lower than his current list prices particulars of such sales shall be furnished by the member concerned to the secretaries immediately after each sale is made." See for examples of agreements where the data was aggregated and anonymous No. 2693 Cheshire Cheese Makers; No. 4336 Banbury Marketing Services (Mushrooms) - paragraph 5(b) and (c) of a Memorandum submitted to the participant's operations is released by Banbury to other participants. All figures are dealt with in summary form. Each participant while agreeing to co-operate in smoothing the distribution of product between market reserves the absolute right to operate according to the best interests of his own business and within its constraints."
33. For a good example of such an argument being presented see No. 4336 Register of Restrictive Trade Practices, Banbury Marketing Services (Mushrooms).
34. Galvanised Tank Manufacturers Agreement (1965) L.R. 5 R.P. 315 at pp. 344, 345.
35. See Daily Mirror Newspapers v. Gardner [1968] 2 W.L.R. 1239; [1968] 2 Q.B. 762; [1968] 2 All E.R. 163 (C.A.); Brekkes Ltd. v. Cattel [1972] 1 Ch. 105 at p. 122 per Pennycuik V.C.; (1972) L.R. 7 R.P. 150.

36. Such cases are not unknown in United Kingdom law see No. 390 Register of Restrictive Practices, Pinn and Allied Trades Association Agreement, Item 18 of the rules states: "To the intent that members shall not be misrepresented or misled by purchasers Members shall send to the secretary their current prices ... and shall where possible notify the secretary immediately of any changes therein."
37. These are similar to the factors traditionally employed by the U.S. Department of Justice. See Kaysen & Turner, Antitrust Policy, (Harvard University Press, 1959) p. 120.
38. Under S.I. 1969 No. 1842 Article 3(2)(b).
39. See e.g. VNP & COBELPA [1977] 2 C.M.L.R. D.28 at p. D.36 para. 29; Groupement Belge des Fabricants de Papier Peints [1974] C.M.L.R. D.127.
40. See, Seventh Commission Competition Report (1977) para. 7(1). In America credit standardisation has been held to violate the Sherman Act. See Plymouth Dealers Association of Northern California v. U.S. 279 F. 2d 128 9th Cir. (1960) an agreement that no member would give credit and all would demand cash-down payment violated the Sherman antitrust law. See also Swift & Co. v. U.S. 196 U.S. 375 (1905).
41. See, Seventh Commission Competition Report (1977) point 7(1) para. 2.
42. e.g. the exchange of turnover data could dispel supplier X's fears that he is losing market share because the data reveals that global turnover is down; or it could reveal that supplier X is losing ground to rivals and that he must redouble his efforts.
43. An example of dubious behaviour would be where at a trade association meeting members are exhorted of the wisdom of adopting the median figure for labour. They might be exhorted that this is the "most intelligent means of costing".
44. O.J. 1984 L212/13.
45. See J.O. 1968 C75/3; [1968] C.M.L.R. D.5 para. 1(c).
46. Community v. Associated Lead Manufacturers [1979] 1 C.M.L.R. 464 at pp. 471, 472 paras. 21-27; Community v. Genuine Vegetable Parchment Association [1978] 1 C.M.L.R. 536 at pp. 547, 548 paras. 62-70; VNP & COBELPA [1977] 2 C.M.L.R. D.28 at pp. D.35, 36 paras. 25-28; The IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D.20 at pp. D.35, 36 para. 43.
47. Cimbel [1973] C.M.L.R. D.167.
48. Zinc O.J. 1984 L22027 at p. 33 para. 36. See also at para. 68.
49. Cimbel [1973] C.M.L.R. D.167. See W.Q. No. 192/72 J.O. 1972 C.138/38 by M.E.P. Mr. Vredeling: limitations des exportations d'acier et de produit siderurgiques de la Communauté a destination des Etats Unis.
50. See Commission Communication on Co-operation Agreements which expresses strong reservations over the exchange of investment data: O.J. 1968 C 75/3; [1968] C.M.L.R. D.5 para. 1.

51. See United Reprocessors [1976] 2 C.M.L.R. D.1 where the three nuclear fuel reprocessors in the EEC formed a joint venture and undertook detailed data exchanges including investment exchanges. The Commission stated (at p. D.10 para. 44): "In the absence of an agreement to co-ordinate investments it is to be feared that certain states would rapidly take an incoherent series of decisions to finance from their national budget plants which would be either too small or in advance of market requirements, thus preventing any plant in the Common Market from quickly reaching its optimum load factor. This would certainly harm the Community's interests for the processing industry would then get structured on the basis of national rather than Community requirements."
52. See, Second Commission Competition Report (1972) para. 18. But an exchange of data which provides the basis for inter-firm compromise so that a firm might modify its projected plant size to a level beneath that needed to avail itself of optional scale economies would almost certainly infringe Article 85(1) EEC.
53. See, National Macaroni Manufacturing Association v. F.T.C. 345 F. 2d 421 (7th Cir. 1965).
54. See e.g. SOCEMAS [1968] 4 C.M.L.R. 28; and Department Stores [1979] 3 C.M.L.R. 637.
55. Potash I [1973] C.M.L.R. D.219. But exchanges may be legal, even by oligopolists, in exceptional cases see, International Energy Agency [1984] 2 C.M.L.R. 186, noted, Green (1984) E.L. Rev. 449.
56. e.g. Socemas [1968] 4 C.M.L.R. 28; Department Stores [1979] 3 C.M.L.R. 637.
57. See, for American cases, Swift & Co. v. U.S. 196 U.S. 375 (1905); U.S. v. First National Pictures Inc. 282 U.S. 44 (1930) a trade association whose members controlled 98% of the trade in question required members to refrain from supplying films to cinemas blacklisted on a circulated credit data list was held to be in violation of the Sherman Act; U.S. v. Alexander & Reid Co. 280 F. 924 (S.D.N.Y 1922) a stop list was considered a serious breach of antitrust law, the case gives an interesting account of the type of market conditions which lead to such practices.
58. See e.g. BMW [1975] 1 C.M.L.R. D.44.
59. *ibid.*
60. See, Commission Communication on Co-operation Agreements *op. cit.* at para. 1.
61. See Hoffman La Roche v. Commission (Case 85/76) [1978] E.C.R. 1139, [1978] 3 C.M.L.R. 211; Dominant supplier in breach of Article 86 EEC for requiring purchasers to notify it of rival supply bids. Hoffman La Roche retained option to meet or undercut the rival bid.
62. See Cases cited at note 32 *supra*.

63. See e.g. No. 3283 (Register of Restrictive Trade Practices, Agreement between members of the Lighting Industry Federation to notify to each other the intention to market new developments.
64. In respect of defaming a person by inclusion on a black list because of a spent decision, see the defences available in §.8 Rehabilitation of Offender Act 1974 .
65. [1984] 3 C.M.L.R. 147.
66. *ibid.*, at pp. 160, 161.
67. Ford Motor Company (licensing for the Manufactur or sale of replacement body parts)(21 March 1984); British Broadcasting Corporation and Independent Television Publications Limited (The Publication of Programme Information)(13 December 1984).
68. *ibid.*, at pp. 37, 38 paras. 8.4, 8.5; See MMC Report on the same Case Cmnd. 9437 (February 1985) at pp. 36, 37.
69. British Broadcasting Corporation and Independent Television Publications Limited (The Publication of Programme Information)(13 December 1984) p. 63 para. 8.17.
70. The figures given in this paragraph should not be taken as absolutes. Discussion with the OFT or Commission may be necessary to determine correct cut-off figures which take into account the degree of market concentration. Clearly the aim of this rule is to prevent data disseminations being used to foster conscious parallelism.

CHAPTER 10

DISTRIBUTION

A. INTRODUCTION

In this Chapter the following matters will be discussed:

- Section B: Exclusive dealing agreements in general.
- Section C: The block-exemption for exclusive dealing in EEC law:
Regulation 83/83/EEC.
- Section D: The negotiation of exclusive dealing agreements falling outside
the bloc-exemption in EEC law.
- Section E: Exclusive dealing in UK law.
- Section F: Exclusive purchasing agreements in general.
- Section G: The bloc-exemption for exclusive purchasing in EEC law:
Regulation 84/83/EEC.
- Section H: The negotiation of exclusive purchasing agreements falling
outside the bloc-exemption.
- Section I: Exclusive purchasing in UK law.
- Section J: Commercial agents.
- Section K: Franchise agreements.
- Section L: Selective distribution.
- Section M: Dealers refused supplies: complaints and remedies.

B. EXCLUSIVE DEALING AGREEMENTS IN GENERAL

This section examines exclusive dealing agreements whereby a supplier agrees to appoint a dealer as the sole distributor of his goods within a defined area. Usually, the dealer agrees to hold only the suppliers brand of goods to the exclusion of competing brands.

I. General Considerations

(i) Attitude of OFT and EEC Commission

In both jurisdictions exclusive dealing is recognised as a beneficial contractual relationship and statutory exemptions are provided for agreements satisfying certain criteria. In the UK exemption is afforded by Schedule 3(2) RTPA 1976 (discussed in Chapter 2 Section I). In the EEC exemption is afforded by Regulation 83/83/EEC discussed in depth below. Neither exemption is absolute. Agreements not falling within the exemptions must seek individual clearance from the relevant authorities. In the UK parties must negotiate with the OFT generally on the basis of Section 21(2) RTPA 1976; In the EEC parties must negotiate with the Commission upon the basis of Article 85(3).

It is relevant to note that in the UK agreements exempt under Schedule 3(2) are nonetheless subject to the Competition Act 1980.

(ii) Economic arguments in favour of exclusive dealing agreements

Paragraphs 5 to 7 of the preamble to Regulation 83/83/EEC (see below) lay out what the Commission consider are the benefits of exclusive dealing. Their view, which is summarised here, is reflective also of that of the OFT. First, exclusive dealing agreements lead to a general improvement in distribution because: the supplier may concentrate his sales activities; he need not maintain numerous business relations with a larger number of dealers; he is accordingly able more easily to overcome distributional problems in international trade deriving from linguistic, legal and other differences. Secondly, exclusive dealing facilitates the promotion of sales and leads to intensive marketing, continuity of supplies and the rationalization of distribution. As a result competition between different brands of products is heightened. Thirdly, exclusive dealing whereby a distributor assumes responsibility for sales promotion, customer services and the carrying of stocks is

often the only way in which a new manufacturer can penetrate a market. Fourthly, exclusive dealing, by intensifying inter-brand competition and encouraging efficient distribution is of benefit to consumers who enjoy a wider choice of goods at competitive prices sold at outlets which are conveniently located.

(iii) Economic arguments against exclusive dealing

Exclusive dealing blunts intra-brand competition i.e. rivalry between dealers supplying the same brand. Economically, this might cause no problem if inter-brand competition is effective i.e. rivalry between dealers supplying different brands of a product. Where inter-brand competition is weak the OFT and Commission will be concerned that dealers will not be subject to effective competitive pressures and will not serve the consumer well. The degree of inter-brand competition will always be important. One economist has stated:

"The blunting of intrabrand price competition does not necessarily arouse concern so long as interbrand competition remains vigorous. Whether this condition is satisfied depends mainly upon how entry opportunities are affected."

"Entry opportunities" will be harmfully affected if a significant percentage of the available dealers are tied up in agreements with suppliers which prevent them from holding a new suppliers brand of product. Where a large percentage of the appropriate dealers are "foreclosed" from new firms in this manner then prospects for effective inter-brand competition are reduced. Firms desiring to enter the market are prevented or hindered by the scarcity of good dealers to distribute their goods for them.

Where exclusive dealing exists in a market where inter-brand competition is low and entry barriers are high as a result of "foreclosure" then consumers are at risk. Dealers enjoy quasi-monopoly power in their territories, they may exploit this by overpricing the goods or by not providing the sort of service to customers that could be expected from dealers in a truly competitive market.

C. THE BLOC-EXEMPTION FOR EXCLUSIVE DEALING IN EEC LAW

Exclusive dealing or distributorship agreements which comply with the terms of Regulation 83/83/EEC discussed below need not be notified to the

Commission. Agreements complying therewith are deemed to be legally acceptable; Exemption under Article 85(3) may be assumed. If for some reason the Commission decide that bloc-exemption is inappropriate for a particular agreement they will then have to issue a formal decision withdrawing exemption. To date this has never occurred. Consequently there are great advantages in drafting an agreement so as to comply with the Regulation. Failure to comply with the Regulation means that the agreement must be notified to the Commission for approval. Parties who are unsure about the application of the Regulation to their agreement may, if they so wish, notify it to the Commission who will advise them accordingly.

For quick reference an outline of the Regulation and the analysis of it in this section is given below.

- I. Introduction: Interpretation. Main points on how to interpret the Regulation.
- II. Article 1: Basic Provision. Detailed analysis of meaning of Article 1. This provision describes the main permissible restriction on the supplier.
- III. Article 2(1): Additional permissible restriction on supplier.
- IV. Article 2(2) and (3): Permissible restrictions on the dealer. Examination on restrictions dealer may be required to accept.
- V. Article 3, non exempt restrictions: Agreements between competing manufacturers. Detailed analysis of Article 3(a) which denies exemption to mutual exclusive dealing between competing manufacturers, and, Article 3(b) which provides a limited exception for non-reciprocal agreements where one party is a small or medium-sized undertaking.
- VI. Article 3(c), Other non-exempt restrictions: Where no alternative source of supply exists, analysis of Article 3(c) which denies automatic exemption where users of the relevant goods have no alternative sources of supply to the exclusive dealer.
- VII. Article 3(d) Other non-exempt restrictions: Where parties attempt to protect exclusive territory. Analysis of Article 3(d) which denies automatic exemption to agreements seeking to hinder parallel imports.
- VIII. Article 6: Withdrawal of exemption from automatically exempt agreements. Analysis of the power of the Commission to issue a formal decision to withdraw exemption.
- IX. Transitional periods: time limits for compliance.
- X. Excluded agreements: Beer and petrol supply.

I. Introduction: Interpretation²

Each year literally thousands of exclusive distributorship agreements are drafted so as to fit with the terms of the bloc-exemption. The current bloc-exemption is contained in Regulation 83/83/EEC³ and if an agreement complies with its strictures it need not be notified and exemption under Article 85(3) may be assumed. There are clearly many advantages to be obtained from drafting an agreement so as to comply with Regulation 83/83/EEC. It should be stressed that agreements falling outside of the Regulation must be individually notified to the Commission if they are to earn exemption under Article 85(3) or are to be settled informally by comfort letter.

In this section the terms of the Regulation will be examined clause by clause. Reference shall be made throughout to a Commission Notice which lays down the Commission's policy in interpreting the Regulation.⁴ This notice is not a legally binding document but, in practical terms, may be relied upon to afford an accurate guide to Commission thinking.⁵ When using this notice as an interpretative guide the caveat expressed by the Commission in its introduction may be considered:

"This notice sets out the main considerations which will determine the Commission's view of whether or not an exclusive distribution or purchasing agreement is covered by the block exemption. The notice is without prejudice to the jurisdiction of national Courts to apply the Regulation, although it may well be of persuasive authority in proceedings before such Courts. Nor does the notice necessarily indicate the interpretation which might be given to the provisions by the Court of Justice."⁶

Further, on interpretation of the Regulation it is always relevant to refer to the preamble as a means of guidance. The Commission give an explanation of policy in the preamble and this also is a valuable tool of construction.⁷

II. Article 1: Basic Provision

Article 1 of the Regulation reads:

"Pursuant to Article 85(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party agrees with the other to supply certain goods for resale within the whole or a defined area of the common market only to that other."⁸

Since this is the core of Regulation 83/83/EEC its wording will be examined in detail.

(i) "For resale"

The dealer must acquire the goods for resale to others. If a dealer acquires goods or raw materials for processing and transformation into other goods then there is no resale. The same applies to the purchase of components which are combined with other components into a different product.⁹ The Commission require that the essential "economic identity" of the product as supplied remains when it is resold. However, this "economic identity" is not destroyed simply because the dealer separates out and repackages the goods prior to resale.

Obviously many dealers (and franchisees who sell using a suppliers trade mark) do perform acts in connection with the contract goods.¹⁰ Simply because a certain amount of alteration or reprocessing occurs does not necessarily mean that exemption is lost. It is a question of degree in each case.¹¹ Thus, where the dealer performs extra operations to improve the quality, durability, appearance, or taste then the Commission will ask how much value has been added to the goods: a slight addition will not alter the economic identity of the goods; a larger addition will alter the economic identity. Trade usage will be relevant in determining the dividing line.¹²

(ii) "Goods"

The Regulation excludes services; only goods agreements benefit. Though, the provision of after-sales services by a dealer in respect of goods is within the scope of the exemption. To remain exempt however the charge for the after sales services must not exceed the price of the goods. It thus follows that the after sales services may be of some value provided the value of the goods is greater.¹³ The Commission consider that the hiring or leasing out of goods for consideration comes closer to a sale than a service, though if related service charges exceed the hire or lease price then the hire or lease will almost certainly be considered the provision of services.

(iii) "Only two undertakings are party"

Only bilateral agreements are covered i.e. one supplier and one dealer. The meaning of "undertaking" has been discussed in Chapter 6. Thus several undertakings forming one economic unit count as a single undertaking. Although Article 1 of the Regulation makes no express reference to the point the Commission accept that a supplier may

delegate the performance of his contractual obligations to a connected or independent undertaking which he has entrusted with the distribution of his goods. Thus a dealer may have to purchase from a representative of the supplier.¹⁴ The involvement of these other parties must be confined to the performance of distribution functions (e.g. carriers, freight forwarder etc.).¹⁵ The fact that only two parties may be exempt means that an agreement between suppliers A and B to share out the supply to dealer X in equal proportions would not be exempt, the agreement would be between three parties. Likewise an agreement between a suppliers trade association and a dealers trade association is considered as an agreement between all supplier members and all dealer members and is thus not between two parties only.¹⁶

The supplier may enter into a series of bilateral exclusive dealing agreements with various dealers and retain the exemption for the agreements.¹⁷

(iv) The exclusive supply obligation: the main restriction

The main exempt restriction allows the supplier to agree to supply only the contract dealer within the whole or a defined area of the Common Market i.e. the supplier will not appoint another dealer in the contract territory. Thus, if X supplies exclusively to three dealers in a territory under different contracts and refuses to supply any other dealers the contracts are not exempt exclusive dealing agreements. The Commission contend that exclusivity is necessary to ensure that the economic benefits of exclusive dealing do materialise.

A supplier who thus merely controls the number of dealers he appoints rather than appointing a single exclusive dealer must notify his agreement; it may well obtain individual exemption under Article 85(3) EEC.¹⁸

It would appear to be the case that if X manufactures and supplies glass and appoints: A as exclusive dealer for glass for use in greenhouses and horticulture; B as exclusive dealer for glass used in factories; and C as exclusive dealer for glass used in double glazing, then exemption should lie. It is certainly arguable that horticultural glass, industrial glass and domestic glass are different products when their usage is considered. A, B and C would enjoy exclusive rights of resale in that they would not be competing with each other. If a supplier considers that his products are de facto

different (e.g. the different types of glass require different production methods and have different properties) so that they have very limited interchangeability of usage, then non-notification may be justified on the basis that they are different products.¹⁹ If there is doubt over this and suppliers prefer certainty they should notify the Commission.

One very important point to note is that the Commission apparently take the view that whilst a supplier can grant exclusivity to a dealer ~~he may still~~ retain the freedom to supply unsolicited orders. Thus, a supplier may agree not to actively sell to customers (who may be end users or other dealers) but ~~he need~~ not agree to refuse to supply unsolicited orders. Where a supplier does supply unsolicited orders he may agree not to supply them in the exclusive dealers territory; it does not matter that the customer may then parallel import them into the exclusive dealers territory and compete with that dealer. In their explanatory notice the Commission state: "The exclusive supply obligation does not prevent the supplier from providing the contract goods to other resellers who afterwards sell them in the exclusive distributor's territory. It makes no difference whether the other dealers concerned are established inside or outside the territory. The supplier is not in breach of his obligation to the exclusive distributor provided that he supplies the resellers who wish to sell the contract goods in the territory only at their request and that the goods are handed over outside the territory. It does not matter whether the reseller takes delivery of the goods himself or through an intermediary, such as a freight forwarder. However, supplies of this nature are only permissible if the reseller and not the supplier pays the transport costs of the goods into the contract territory."²⁰ Thus the supplier can sell to other dealers where: (i) orders are unsolicited; (ii) the goods are handed over outside of the exclusive dealers territory; and (iii) the customer (i.e. the dealer) pays the costs of transporting the goods into the exclusive dealers territory from outside. Surprisingly given the permissive nature of the above the Commission have required a supplier to modify his dealership agreements so as to permit him to meet unsolicited orders as a condition of granting the supplier a comfort letter and discontinuing their investigation.²¹ Does this imply that the Commission require suppliers to retain freedom to supply unsolicited orders? The language of the Regulation and the explanatory notice issued by the Commission required the supplier to meet unsolicited orders at the price

prevailing in the suppliers own territory.²² Presumably if a supplier has no sales and marketing capacity of its own (e.g. is purely a manufacturer) then there would be no obligation to supply unsolicited orders.

(v) "Within the whole or a defined area of the Common Market"

Commission experience has suggested to them that an agreement covering the whole of the EEC can be economically appropriate. The European Court has confirmed that this is so.²³ Agreements may now be drafted so as to cover the whole of the EEC or only a part thereof.²⁴

A point of interest is whether an agreement between X and Y whereby Y is the exclusive dealer for certain EEC States and certain other non-EEC States is exempt? Under the old Regulation 67/67/EEC (now replaced by Regulation 83/83/EEC) the Commission and Court took the view that provided the possibility of parallel imports remains, i.e. there are no restraints on cross frontier trading, the exemption applies.²⁵

(vi) "Agreements"

Article 9 of the Regulation provides that the Regulation applies to concerted practices of the type defined in Article 1. Thus, as the Commission explain in paragraph 26 of the explanatory notice, this enables "arrangements which are operated by undertakings but are not the subject of a legally-binding agreement" to be exempt. To be exempt however the concerted practice must be in effect on the terms of the Regulation. For the meaning of concerted practice see Chapter 6.

(vii) "only to that other"

The duty on the supplier to supply only to the contract dealer thus permits restrictions on "skip deliveries" i.e. supplies made by the supplier to a level of trade below that of the dealer e.g. by the supplier to a retailer where the contract dealer is a wholesaler. The supplier may thus be bound to his distributional function. A similar clause imposed upon the dealer is not however exempt; no exemption exists under Article 2 (permissible restrictions on dealer, see below) which embraces prohibitions on "skip-deliveries". Though, the Commission adopts a pragmatic view of such clauses and individual exemption may be obtained. They accept that confining a firm to its specified distributional function may enhance the effectiveness of a distribution system.

III. Article 2(1): Additional permissible restriction on supplier

Article 2(1) allows an obligation on the supplier "... not to supply the contract goods to users in the contract territory". In the light of the analysis of Article 1 above this must be read to mean that the supplier may agree not to actively supply users in the contract territory i.e. he must retain the right to supply unsolicited orders. Where an unsolicited order is made the supplier must satisfy it outside of the exclusive dealers territory.²⁶ Thus where a UK supplier supplies a customer from Belgium in the United Kingdom the customer would have to pay the freight costs back to Belgium. A supplier may refuse to supply an unsolicited order if the supplier and the dealer are situated in the same area e.g. a supplier in the UK and an exclusive dealer for the whole of the UK. In such cases it may in any event be that the supplier does not maintain any sales capacity and concentrates solely on production.

The restriction on the supplier need not be absolute, clauses allowing the supply of certain specified (e.g. specialised) customers may be incorporated. Further, a compensation clause by which the supplier pays, for example, a sum per sale to the dealer, is permissible. However these direct sales by the supplier can only be to end-users or consumers, they may not be to other dealers in the area. If the supplies are to other dealers then the bloc exemption does not apply and the agreement should be notified. The preamble explains this in terms of the need to maintain a clear "division of functions" between the parties thereby compelling the dealer to concentrate his sales efforts on the contract territory and the contract goods and in so doing ensuring the realization of the distributional advantages sought by the regulation.²⁷ The regulation thus allows suppliers to consider how best to supply large or specialised users by reference to the relative costs and capacities of the supplier and the dealer.

It appears to be unlikely that any other restrictions on the supplier may be incorporated without exemption being lost. However, the Court adopts more of a pragmatic view and has held that not all restrictions injure competition. Given the current state of the law it should be assumed that additional restrictions on the supplier entail the necessity to notify. Though it would appear that advertising obligations on the supplier (e.g. supplier will expend 10% of his annual turnover on advertising) are not within Article 85(1) on a de minimis basis (see below under Section IV(vi)) and hence may be imposed on the supplier without losing bloc-exemption.

IV. Article 2(2) and (3): Permissible restrictions on the dealer

Article 2(2) and (3) focus on permissible dealer restrictions. The Regulation is clear that only certain restrictions are exempt. In paragraph 8 of the preamble it is thus stated: "Whereas further restrictive obligations and in particular those which limit the exclusive distributor's choice of customers or his freedom to determine his prices and conditions of sale cannot be exempted under this Regulation." Thus, no other dealer restrictions other than those specified are allowed and in particular restrictions on the dealer's freedom over choice of customers, prices and conditions of sale are outside the exemption.²⁸ The restrictions allowed in Article 2 may last only for the duration of the agreement, no longer.²⁹ Article 2(2) and (3) contain a number of parts.

(i) Article 2(2)(a): non-manufacture or distribution

This provision permits the supplier to restrict the dealer from manufacturing or distributing goods which compete with the contract goods. For a discussion of the notion of "competing goods" see analysis under Article 3(a) and (b) below.

(ii) Article 2(2)(b): exclusive purchase

This provision permits an obligation on the dealer to purchase the contract goods exclusively from the supplier. Under this Regulation exemption only lies if there is an exclusive supply obligation (i.e. Article 1) and an exclusive purchase obligation (i.e. Article 2(2)(b)). If an agreement only has an exclusive purchase obligation Regulation 83/83/EEC is irrelevant but *bloc* exemption may be obtained if the agreement satisfies Regulation 84/83/EEC on exclusive purchasing.

(iii) Article 2(2)(c): Active marketing outside exclusive area

This provision permits clauses entailing,

"the obligation to refrain, outside the contract territory and in relation to the contract goods, from seeking customers, from establishing any branch and from maintaining any distribution depot."

The provision relies upon the distinction between passive and active. A dealer may not go hunting sales outside of his territory but he must retain the right to satisfy unsolicited orders. If further restrictions on the dealers right to "sell away" exist they must be given individual Commission blessing. Thus in Campari³⁰ the Commission exempted a pure exclusivity clause, i.e. no sales whatsoever outside of territory, on

the basis that it was needed to ensure that the licensee of a trademark took adequate steps to invest and improve its distribution system.

The 'exemptability' of monitoring clauses e.g. a clause requiring the dealer within fourteen days after the end of each month to supply to the other party a statement of any exports or sales outside of his territory, is uncertain. It is arguable that this clause serves only to check that the dealer fulfils his obligations under the main exempt clause and hence should also be exempt. However, it is also arguable that such a clause could be viewed as a means whereby the supplier imposes informal pressure on the dealer to prevent him selling outside his territory. The Commission apparently adopt the view that so long as the monitoring clause is employed genuinely it is legitimate.³¹

Apparently an exclusive dealer may be prohibited from satisfying orders from outside the EEC.³² This was so under the old Regulation 67/67/EEC and the wording of the provision in Article 2(2)(c) of Regulation 83/83/EEC is exactly the same as the old provision. The Commission consider that the higher prices dealers will charge to cover freight, customs, additional profits etc. make reimport very unlikely and hence inter Member State trade even more improbable. Such a clause is not expressly exempted under the Regulation; it might be wise to seek informal Commission clearance by way of a comfort letter.

Such a prohibition would not be acceptable to the Commission where it concerned States which have a free trade agreement with the EEC (e.g. the European Free Trade Agreement: States (EFTA)).

If the supplier seeks to impose the advertising and active marketing ban on dealers below the level of the exclusive dealer (i.e. on sub-dealers of the exclusive dealer) then individual exemption must be sought. This is given if the ban results in sub-dealers concentrating their efforts on meeting demand in the territory and thereby bringing about sought after distributional advantages.³³

(iv) Article 2(3)(a): Complete ranges of goods

This allows the supplier to require the dealer to purchase complete ranges of goods or minimum quantities of goods. Although drafted in the alternative both requirements may be (and commonly are) imposed simultaneously.³⁴ It appears probable that a complete range of goods

means the same as it does under Article 2(3)(a) of Regulation 84/83/EEC on exclusive purchasing (discussed below). If that is so then a complete range of goods means a complete range of goods which are by their nature or commercial usage connected to each other. Thus, the tying of uncomplementary and unconnected goods together might entail loss of exemption.

(v) Article 2(3)(b): trademarks and packaging³⁵

This allows the supplier to, require the dealer to "sell the contract goods under trademarks, or packed and presented as specified by the other party". This restriction causes no antitrust problems. Indeed it might be illegal (tort of unfair competition and/or passing off) for the dealer to remove the trade mark, design or packaging.³⁶ The dealer may be obliged to display the trademark variously on stationery, in correspondence related to the goods, in brochures, leaflets, price lists, and in general advertising. He may also be required to affix the trade mark prominently in the business premises.³⁷ Further, the dealer may be restricted in his use of the mark e.g. in combination with the dealers trademark or design. The suppliers right (and also his capacity) to regulate use of a trade mark by a dealer will also stem from relevant national intellectual property law.

(vi) Article 2(3)(c): Measures for promotion of sales

The supplier may require the dealer to,

"take measures for promotion of sales, in particular:

- to advertise,
- to maintain a sales network or stock of goods,
- to provide customer and guarantee services,
- to employ staff having specialized or technical training."

It is fundamental in every distribution contract that the dealer shall use "best endeavours" to promote the suppliers goods; often an express clause to this effect is included in the contract. It is sometimes questioned whether general promotional obligations are restrictions at all under Article 85(1). The Commission adopt the view that technically they are within Article 85(1) but that they usually do not have an appreciable effect on competition so fall out of Article 85(1) on the basis of de minimis i.e. negligible effect.³⁸ If a promotion clause specifies a required turnover level or requires a dealer to take a specified quantity at specified times then an appreciable

restriction might arise.³⁹ Though even this may well be exempt under the Regulation since in the preamble it is stated that it is a matter for free negotiation between supplier and dealer as to the desirability of incorporating promotion clauses.⁴⁰

The enumeration in Article 2(3) is non-exhaustive. Thus other promotion clauses not mentioned there may be incorporated. Thus, a duty on the dealer to report back sales data is probably exempt. Such a clause permits the supplier to monitor sales trends and adjust his marketing policies accordingly.

As regards advertising the supplier may require the dealer to undertake a specified minimum amount of advertising, or include a specified content in his advertising.⁴¹ Moreover, the dealer may be prohibited from advertising in trade fairs etc. without the supplier's permission though it might be that such permission should not be unreasonably withheld.⁴² However, it is unlikely that exemption exists if the dealer is required to undertake advertising in excess of that needed to draw attention to the supplier's goods in an effective manner.⁴³

As regards a "sales network" the supplier may regulate eg. the qualifications and activities of the dealer's staff and the number of visits made per month to customers. Presumably reporting obligations on the dealer to keep the supplier informed are also covered. The supplier may regulate the stock of the dealer as regards minimum quantities of certain types etc.⁴⁴

With respect to after sales service and guarantees. The supplier may require the dealer to follow his guidelines on this. A common problem occurs where the supplier requires the dealer to use the supplier's spare parts in providing after sales services. This should be exempt provided the use of these spare parts are technically necessary to effect repairs or protect the quality of the product. Where such conditions are not met the Commission may well take the view that the supplier is trying to create a market in the spare parts that he would otherwise not enjoy. The Commission's view will probably be influenced by the nature of the spare parts market and by the extent to which independent suppliers of spare parts are excluded from the market by prohibitions on the dealer from accepting such spare parts.

Regulation 83/83/EEC will not apply if the dealer is prevented from providing after sales or guarantee services to the supplier's goods

which are brought into the dealer's territory by parallel imports, i.e. by someone other than the exclusive dealer. The Commission adopt a similar view if the dealer is required to give different (inferior) treatment to parallel imported goods.⁴⁵ Suppliers may not justify different treatment on technical or safety standards grounds.⁴⁶

With respect to staffing the dealer may be required to employ staff having specialised skills which will guarantee that the goods in question are properly marketed and that the reputation of the supplier is thereby protected. A supplier may specify training programmes for dealers staff to be undertaken under either independent supervision or under the dealer's supervision.

(vii) Other restrictions are non permissible

Other than those restrictions allowed by Article 2 no others are allowed. It should be stressed that the supplier may not impose restrictions on: the customers the dealer may supply; the price the dealer charges at; or , the terms and conditions the dealer supplies on.⁴⁷

As regards customers it will be recalled that the supplier may reserve the right to supply specialised or large customers that he feels the dealer is unable to cope with. Compensation payments may be made in respect of these sales . However, the supplier may not expressly restrict the customers to whom the dealer may supply, e.g. dealer cannot supply specialist customers who will be served by the supplier. If such restrictions are imposed the parties must obtain the Commission's express approval.

As regards prices, any attempt by the supplier to enforce resale price maintenance will be outside the exemption and most unlikely to obtain Article 85(3) exemption. Indeed the Commission takes a dim view of RPM. See Chapter 8 for details.

The phrase ' terms and conditions ' covers a multitude of sins. It covers, for example, credit, payment periods, discounts, delivery, insurance etc. The dealer must be given freedom to determine his own policy. Individual exemption from the Commission must be sought where such clauses are included.

V. Article 3 non-exempt restrictions: Agreements between competing manufacturers

Article 3(a) provides that no exemption is available where,

"manufacturers of identical goods or of goods which are considered by users as equivalent in view of their characteristics, price and intended use enter into reciprocal exclusive distribution agreements between themselves in respect of such goods."

Article 3(b) provides an exception to this where, first, the agreement is non-reciprocal, and secondly one of the parties has an annual turnover of no more than 100 million ECU (approximately £55-60 m, depending on prevailing exchange rate). Both the basic rule and the exception are examined below.

(i) Basic rule: no exemption for mutual exclusive dealing

Reciprocal exclusive dealing between rival manufacturers may be exempted but this must be obtained via individual representation to the Commission.⁴⁸ The reason lies in the concern that if two competitors entrust the distribution of their goods to each other then each competitor will, in marketing the goods, devote greater effort to their own brand than to their rivals. Thus, a tendency towards market sharing may emerge. If X in the South entrusts distribution in the North to Y; and Y entrusts distribution in the South to X, then X's goods may be sold more effectively in the South and Y's goods more effectively in the North.

For the exemption to not apply the two manufacturers must be producers of "identical" goods or of "equivalent" goods. The meaning of "equivalent" requires explanation. Equivalence is determined by a "consumer preference" test i.e. would the user view the two manufacturers goods as equivalent.⁴⁹ The test is essentially one of substitutability: are the goods interchangeable in view of their characteristics, price and intended use. Goods might have similar characteristics in that they are fungible, or combustible or edible etc. Oranges and peaches are different products but have important similarities of characteristic. Similar goods, conversely, may not be equivalent because of price differentials. Thus manufacturers of fish paste and caviar both produce fish products but it can hardly be said that the products are equivalent. With respect to intended use X and Y might be fruit farmers but whereas X supplies only the confectionary trade, Y supplies only the specialist fruit wine trade and hence the intended use of the fruit might mean that the goods do not effectively compete (though they may be potential competitors).

Thus, if parties supply products which by their characteristics, price and intended use are different (i.e. non-equivalent) then a

mutual exclusive dealing arrangement may be exempt.⁵⁰ In such a case the manufacturers will not be competitors. Arrangements such as these are not uncommon for example with respect to specialisation agreements. Producer X and Producer Y might have agreed to concentrate R & D and marketing on different types of complementary drug. They might also have agreed to cross-supply each other with their own brand of product. Such an agreement may well be exempt under Regulation 3604/82/EEC⁵¹ on bloc-exemption for specialisation agreements (for details see Chapter 12-Joint Ventures).

The commentary above applies irrespective of whether the parties to the agreement are within or without the Common Market. See the Cansulex - SNEAP case referred to below in respect of the exemption for an example of this.

Where one or both of the parties to the agreement is part of a group or is controlled by another party reference should be made to the commentary below on "connected undertakings".

(ii) The exception: non-reciprocal agreements where one side is a small or medium sized undertaking

Article 3(b) permits a manufacturer to entrust distribution to a rival where: (a) the agreement is not reciprocal i.e. only one party entrusts distribution to another; and (b), one party has a total annual turnover of less than 100 million ECU i.e. is a small or medium sized undertaking in community terms.

It is recognised by this exception that certain manufacturers make ideal dealers for other rival manufacturers. Indeed, for a small manufacturer X an agreement with an existing large manufacturer Y whereby Y acts as dealer for X's goods may be one of the only means of penetrating a market. Y will use his own existing distribution network to market X's goods.

The test to be used in calculating "total annual turnover" is given in Article 5 of the Regulation. The relevant calculation period is the last financial year. The turnover to be assessed is that of the relevant party and all connected undertakings (see below) and includes the turnover of all goods and services. In making this calculation a number of exclusions must be taken into account. These are: (a) all taxes and other duties paid by the relevant undertaking and all connected undertakings; (b) all turnover derived from dealings between the parties to the agreement; (c) all turnover derived from dealings between a party to the agreement and its connected undertakings;

and (d) turnover derived from dealings between the connected undertakings.⁵² It is helpful in comprehending the above to note the Commission's view:

"Annual turnover is used as a measure of the economic strength of the undertakings involved. Therefore, the aggregate turnover from goods and services of all types, and not only from the contract goods, is to be taken. Turnover taxes and other turnover related levies are not included in turnover. Where a party belongs to a group of connected undertakings, the world wide turnover of the group, excluding intra-group sales ... is to be used."⁵³

Where parties find that their agreement fits within the exemption they will not lose it simply because the smaller party has a turnover that for a period slightly exceeds the 100 million ECU threshold. Article 5(2) permits the exemption to remain "... 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%." However, bloc-exemption will be lost if, at the end of the second financial year, the total turnover over the preceding two years has been over 220 million ECU. If block-exemption is suddenly lost parties must either abandon the agreement or notify it rapidly.⁵⁴

Obviously, if both parties fall below the 100 million ECU ceiling exemption is automatic.

Where an agreement is not automatically exempt what are the chances of individual exemption? Where the parties are powerful firms or are oligopolists the chances are very slim. The Commission has stated: "The Commission is not opposed to co-operation between competing manufacturers in the distribution of their products provided all the conditions of Article 85(3) are fulfilled. The Commission's experience has shown, however, that agreements of this type between large undertakings having strong market positions will normally not result in such improvements in distribution and benefits to consumers as to outweigh the disadvantages for competition which are involved."⁵⁵ In particular the Commission pinpoint as an obstacle Article 85(3)(b) EEC which (see Chapter 7) provides that exemption is unavailable where the agreement affords the undertakings the possibility of eliminating competition in respect of a substantial part of the relevant product market.⁵⁶

A case on point, which was settled by abandonment of the agreement by the parties following Commission intervention was

Cansulex - SNEAP⁵⁷. Cansulex, the world's leading sulphur exporter, proposed to transfer sole distribution rights for its products in Western Europe and North Africa to Société Nationale Elf Aquitaine Production (SNEAP) the largest sulphur producer in the EEC. Prior to this proposal Cansulex marketed sulphur in the EEC via an independent distributor which competed with SNEAP. The Commission refused to permit the proposal to materialise. The following factors were relevant to their refusal and are informative in respect of Commission policy in this field:

- (a) The Community market in crude sulphur is characterized by very tight oligopolistic conditions in which the leading three suppliers control over two-thirds of the total sales. The Commission are always very wary of any form of agreement whereby oligopolists are strengthened. SNEAP and Cansulex are competitors and the agreement would have merely strengthened the rigid market structure.
- (b) The structure of the sulphur market was deteriorating. SNEAP the largest EEC producer had recently acquired Texas Gulf who possessed Arabian sulphur supplies which would in the imminent future be exported to the EEC. Thus, the number of independent firms in the market was decreasing.
- (c) The general political-economic climate suggested that Cansulex would become very much more important on the EEC market. Uncertainty concerning the security of Polish supplies and increasing demand suggested a growing significance for the Canadian exporter. The Commission noted: "The proposed co-operation would have enabled SNEAP to control the sale of Canadian sulphur in Europe and not only restrict existing competition but also prevent the keener competition expected in the future."⁵⁸
- (d) It is also noteworthy that it was the larger of the two parties (Cansulex) who sought to act as supplier and the smaller (SNEAP) who sought to act as dealer. One justification for allowing such agreements is that they allow a small supplier to use a distribution network the scale of which it would otherwise have been unable to afford. Where the supplier is the world leader this justification can hardly apply. Though, in other circumstances large companies may legitimately be the supplier e.g. where the large party supplies the smaller party with complementary goods to complete its range of goods.

(iii) Meaning of "connected undertakings"

The phrase "connected undertakings" is relevant to an understanding of the competing manufacture provisions in Article 3(a) and (b). Article 4 provides that no exemption applies where the contract goods in an exclusive dealing arrangement between competing manufacturers are manufactured by an undertaking connected with a party to the agreement. This provision is necessary to avoid circumvention of Article 3(a) and (b). A manufacturer X could incorporate a wholly owned subsidiary ABC Ltd. to act as its main distributing arm. ABC Ltd. would then enter an agreement with a manufacturer Y who would distribute the goods supplied to it by ABC Ltd. but manufactured by X. The ABC Ltd./Y agreement would not be between competing manufacturers and could be dressed up to fall within the exemption in the Regulation. The economic reality is an agreement between X and Y which would not be exempt.

A connected undertaking is an undertaking which either, directly or indirectly, controls or is controlled by another Company. Control means: (a) ownership of more than half the capital or business assets; or (b) power to exercise more than half the voting rights; or (c) power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking; or (d) the right to manage the affairs of the company.

If a company which controls an undertaking which itself controls a party to the actual agreement is a manufacturer then no exemption will lie. Thus where Z who controls X (a holding company) who controls ABC Ltd. is a manufacturer the agreement between ABC Ltd. and Y (a competing manufacturer to Z) is outside of the exemption. In reality it is an agreement between two rival manufacturers Z and Y. In effect Article 4(2) prevents what are in effect competing manufacturer agreements being set up through non-manufacturing subsidiaries and holding companies.

Companies that parties to an agreement jointly control are connected with each of the parties to the agreement. Thus joint production companies are connected to the joint venture parents. Thus rival manufacturers cannot incorporate joint venture companies to distribute their goods and obtain bloc-exemption.⁵⁹

VI. Article 3(c) Other non-exempt restrictions: Where no alternative Source of Supply exists

Article 3(c) provides that no exemption lies where, "users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory." The exemption thus only lasts whilst the possibility of parallel imports prevails i.e. that there is an alternative supply of the contract goods available to users outside of the exclusive territory. If the exclusive dealer has as his territory the whole of the EEC then supplies must be available outside of the EEC.⁶⁰ Availability implies that goods must actually be obtainable in adequate quantities and available at the ordinary price prevailing there. If goods are theoretically available but at discriminatory prices or on unreasonable terms and conditions then their availability will be more theoretical than actual and the potential for the existence of alternative sources to act as a competitive force on the exclusive dealer will be minimal.⁶¹ Thus, if X manufactures shoes brand name "Hob Boots" in the UK and appoints Y his exclusive dealer for the whole of the EEC (which is the only selling area for the shoes) then a user cannot obtain "Hob Boots" outside of the EEC and he must purchase from Y. The absence of an alternative source of supply of Hob Boots means that Y is not subject to the additional competitive pressures of a parallel importer. Accordingly, no bloc-exemption exists and individual exemption must be sought for the agreement.

Article 3(c) is really only a major problem where the dealer enjoys absolute territorial protection as where he is the only appointed distributor. The problem may be circumvented by allowing the supplier to represent an alternative source of supply. The supplier must be prepared to supply the goods on request to final users located in the contract territory.⁶² The Regulation only speaks of final users being able to obtain alternative supplies, not other dealers. In practice it will probably be substantial sized firms that require the product as an input into their own production system who will seek the alternative supplies.

The alternative supplies will presumably consist of the identical brand to the product sold by the exclusive dealer. Though, if the alternative is slightly different, for example because they use a different trade mark to suit linguistic differences⁶³ or because they have different components or ingredients to suit slightly different national tastes,⁶⁴ a problem arises. In such cases whether the alternative supplies satisfy the

requirements of the Regulation, i.e. whether they are a viable alternative to the exclusive dealers goods, will probably be a question of fact. Thus an identical product with a different trade mark will probably be adequate provided there is no consumer objection to that trade mark which will render those alternative goods inadequate or provided the differences in components or ingredients of the alternative goods are not such as to make them unsuitable for use in the territory of the exclusive dealer. Where a supplier can foresee problems of this nature he may be advised to act as the alternative supplier and to supply unsolicited orders himself.

VII. Article 3(d) Other non-exempt restrictions: Where parties attempt to protect exclusive territory

Article 3(d) excludes the exemption where either the supplier or the dealer hinder other dealers, users or other intermediaries obtaining the contract goods from other dealers inside the EEC, or where no alternative sources of supply exist inside the EEC from outside the EEC.⁶⁵ The preamble explains this provision as follows:

"Whereas consumers will be assured of a fair share of the benefits resulting from exclusive distribution only if parallel imports remain possible; whereas agreements relating to goods which the user can obtain only from the exclusive distributor should therefore be excluded from the exemption by category."⁶⁶

The Commission has stressed in the explanatory notice that bloc-exemption evaporates the moment that either party seeks to block parallel imports into the contract territory. Moreover, the Commission state:

"Agreements in which the supplier undertakes with the exclusive distributor to prevent his other customers from supplying into the contract territory are in-eligible for the block exemption from the outset. This is true even if the parties agree to prevent imports into the Community from third countries. In this case it is immaterial whether or not there are alternative sources of supply in the Community."⁶⁷

The Commission note two examples of practices which if adopted lead to inapplicability of the exemption. These are:

- (i) where one or both of the parties exercises industrial property rights so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory properly marked or otherwise properly marketed contract goods; and
- (ii) where one or both of the parties exercises other rights or take other measures so as to prevent dealers or users from obtaining outside, or from selling in, the contract territory contract goods.

Thus, the enforcement of a trade mark or patent with the improper objective of ensuring, or seeking to ensure, absolute territorial protection is not exempt.⁶⁸

It is clear that in some circumstances, however, suppliers may take measures to hinder exports by a dealer to another exclusive territory. Under Article 2(2)(c) the supplier may require the dealer from actively selling outside his contract territory (as distinct from just meeting unsolicited orders). Thus, where a dealer goes about actively seeking customers outside of his territory then this would constitute a breach of contract justifying the supplier in terminating supplies and rescinding the contract. Provided the supplier acts within the confines of Article 2 he may control the extent to which his dealers supply goods into the territories of dealers.

VIII. Article 6: Withdrawal of exemption from automatically exempt agreements

Under Article 6 the Commission may withdraw the exemption from an agreement that would otherwise be exempt. This it will do when it discovers an agreement to have anticompetitive consequences. Article 6 gives four examples of situations that might lead to loss of exemption. At the outset it should be stressed that the Commission rarely use this provision. No formal decision has ever been taken withdrawing exemption under this or its predecessor provision in Regulation 67/67/EEC. Though, the Commission do use it as a bargaining counter in negotiations to persuade firms to amend and modify their agreements. If the power was used it would require a formal Commission decision to withdraw the exemption. It is implicit that pending a formal decision an agreement retains its validity. It would almost certainly be a breach of the principle of "sécurité juridique"- legal certainty - for a decision withdrawing exemption to operate retroactively.⁶⁹ Parties to an agreement threatened by a retroactive decision may appeal it to the European Court under Article 173 EEC. As a further ground of appeal it is probably a breach of the principle of "protection de la confiance légitime" - protection of legitimate expectations.⁷⁰ Under this principle Community measures or acts must not violate the legitimate expectations of those concerned unless justified by some overriding public policy consideration.⁷¹ This ground of appeal may be based upon the explanatory notice which, in paragraph 24, expressly states that a formal decision will not have retroactive effect. If the Commission did issue a retroactive decision parties could argue the legitimacy

of their relying upon the public statement of the Commission in the explanatory notice.

The situations in which withdrawal of exemption may occur are:

(i) Inter-brand competition weak, Article 6(a)

Where "the contract goods are not subject, in the contract territory, to effective competition from identical goods or goods considered by users as equivalent in view of their characteristics, price and intended use." Thus, exemption may be withdrawn if inter-brand competition (i.e. competition between rival manufacturers goods) is weak. This might be the case where oligopolists each operate fairly tightly controlled distribution networks. (For the meaning of "equivalent" goods see commentary above under Agreements between competing companies).

(ii) Existence of barriers to entry, Article 6(b)

Where "access by other suppliers to the different stages of distribution within the contract territory is made difficult to a significant degree". This covers the problem of points of sale foreclosure i.e. effective dealers being tied into established distribution networks and restrained from carrying the goods of competing supplier (no-dualling restrictions). Where a high percentage of the available distributors are foreclosed from rival suppliers an obstacle to the entry of potential suppliers might arise. In other words the existence of exclusive dealing networks may per se constitute an entry barrier. The problem may, in particular, arise where the supplier needs specialised dealers with specific skills in handling and marketing the suppliers goods. Such specialist dealers may not be available in large numbers.

(iii) Hindrances to obtaining supplies outside of territory, Article 6(c)

Where "for reasons other than those referred to in Article 3(c) and (d) it is not possible for intermediaries or users to obtain supplies of the contract goods from dealers outside the contract territory on the terms there customary." This is a "catch all" provision which operates in the unlikely event that an agreement which hinders parallel imports directly or indirectly should escape Article 3(c) and (d). A possible safeguard against use of this provision may be a clause in the contract whereby the dealer may be required to supply outside of their territories on prices and terms and conditions prevailing within their territories taking due account

of carriage costs.

(iv) Refusal to supply, Article 6(d)

Where the exclusive dealer, "1. Without any objectively justified reason refuses to supply in the contract territory categories of purchaser who cannot obtain contract goods elsewhere on suitable terms or applies to them differing prices or conditions of sale; 2. Sells the contract goods at excessively high prices." This provision provides for withdrawal of exemption where a dealer, who enjoys significant albeit not absolute territorial protection, exploits the economic power his exclusive dealership affords him to the detriment of the consumer or other purchaser. It will be recalled that to justify Article 85(3) EEC exemption consumers must obtain a fair share of the resulting benefit of an agreement. If the dealer refuses to supply a final user for no apparent reason Article 85(3) can hardly be satisfied. If the dealer refuses to supply a customer because he suspects that customer to be a parallel importer who will transport the goods to another territory where they are more expensive and sell them there at a price which undercuts the resident exclusive dealer, then exemption may be withdrawn because the dealer is hindering parallel imports. Such a clause would also probably fail under the test in Article 6(c) above. As regards the second instance specified above, if the dealer prices the goods at an excessively high level then the Commission may withdraw the exemption if there is no prospect of a parallel importer introducing the contract goods into that territory at a lower price to exert a pro-competitive pressure and thereby force the exclusive dealer to reduce his prices.

IX. Transitional Periods: time limits for compliance⁷²

Any agreement entered after 31 December 1983 must conform to the Regulation if it is to obtain exemption.

Any agreement entered before 31 December 1983 and which is exempt under Regulation 67/67/EEC, the predecessor to Regulation 83/83/EEC, is valid up until 31 December 1986. Thus, there is for this category of agreement, a three year transitional period. After 31 December 1986 all such agreements must comply with the new Regulation if they are to remain bloc-exempt. Failure to modify on the terms of Regulation 83/83/EEC will

necessitate notification of the agreement to the Commission .

X. Excluded agreements: Beer and Petrol supply⁷³

Agreements for the resale of drinks (principally beer) or for the resale of petroleum products in petrol stations are excluded from Regulation 83/83/EEC. Such agreements are expressly covered in Articles 6 to 13 of Regulation 84/83/EEC. These provisions are examined below.

D. THE NEGOTIATION OF EXCLUSIVE DEALING AGREEMENTS
FALLING OUTSIDE THE BLOC-EXEMPTION IN EEC LAW

Where an agreement is not exempt under Regulation 83/83/EEC it must be notified individually to the Commission. Parties may consider the points below as a means of assessing the likely attitude of the Commission.

I. Market Structure: inter-brand competition

Where the supplier is the possessor of economic power then distortions of competition may derive from an exclusive dealing agreement. A supplier who grants a dealer an exclusive right to sell his goods in a widely defined area gives to that dealer a virtual monopoly over the sales of that brand of product. If inter-brand competition is weak (i.e. there are not many rival suppliers) then the exclusive dealer may enjoy considerable autonomy over prices and terms and conditions of trade which may work to the consumers detriment. Analysis by the Commission will very much focus upon the extent of inter-brand competition. Where this is vigorous and healthy the effectiveness of intra-brand competition (competition between dealers stocking the same brand) is not quite so important.

For example if Supplier X grants exclusive dealerships which confer upon the appointee a sole right to supply their national markets then the Commission will examine the degree of market concentration in each national market (i.e. the number of rival suppliers to X) before assessing the effects upon competition. Where the Commission find very little inter-brand rivalry their attitude will be stricter than where there are other effective suppliers to exert competitive pressure on X and his dealers. Inter-brand competition, of course, will not be the sole criteria, it will, nonetheless be an important one.⁷⁴

II. Foreclosure

The foreclosure problem is common to both exclusive dealing and purchasing agreements.⁷⁵ When a dealer agrees with a supplier to purchase only that suppliers brand of goods for resale then that dealer has been foreclosed as an outlet for other suppliers. Foreclosure is not a problem so long as there exists sufficient dealers of appropriate qualifications to resell other suppliers goods. Where, however, the great majority of dealers are locked into a suppliers network and are prohibited from "dualling" - carrying dual brand lines of a product - then prospective manufacturers may experience considerable difficulty in obtaining proper representation or existing manufacturers may experience difficulty in expanding. The absence of available dealerships thus operates as a substantial barrier to market entry and expansion. Whether or not dealers are foreclosed will depend upon various factors such as the nature of the product and the structure of the dealership market. A non-technical, non-fungible product may be sold through a wide variety of commercial outlets, if a supplier is refused representation through one type of dealer he may seek representation with other types. Camping equipment may be sold through sports equipment shops, DIY shops, large supermarkets and specialist camping equipment dealers. If the specialists are foreclosed then the product may be stocked by other non-specialist dealers. Thus, the nature of the product and the nature of the dealership required by the supplier must be considered.

If a supplier is unable to find properly qualified representation he may be forced to set up his own distribution network. Very few suppliers have the capital to follow this course of action. Normally, use of dealers is the only means many manufacturers have of selling their goods.

III. Parallel Imports

It is a basic tenet of Commission policy that suppliers may not give to their dealers absolute territorial protection. Agreements which seek to prevent the export of goods by the dealer from his territory or which hinder the import of the suppliers goods into an exclusive dealers territory by a third party are always in violation of Article 85(1). EEC competition law seeks, as a primary objective, the elimination of trade barriers to the free movement of goods within the EEC. Artificial barriers, for instance absolute export prohibitions on dealers, erected in the context of distribution agreements are hence prime candidates for challenge by the Commission.⁷⁶

The following less overt hindrances to parallel imports have been attacked by the Commission. It should be understood that the incorporation of any of the clauses below is likely to lead to a strict Commission approach probably involving the imposition of fines upon the supplier and, to a lesser extent, the dealer.⁷⁷

(i) Unfair Competition

Threats made to third parties that the parties will invoke national law on unfair competition to prevent them importing into the territory of the contract dealer. Even where parallel imports are discouraged by national law such threats by the parties violate Article 85;⁷⁸ Community law is supreme over conflicting domestic law.

(ii) Compensatory Payments

Compensatory payments made by a dealer to another dealer where the former has exported outside of his territory into the territory of the latter may well be treated as equivalent to export bans.⁷⁹ The payor is thus penalised for undertaking parallel supply and his goods are made more expensive. Such a system tends to discourage parallel supplies. The rule against compensatory payments is not absolute. Such payments may be valid however if they form part of a scheme entered into by a number of suppliers who are seeking jointly to compete on the world market with large multinationals there.⁸⁰ It is also justifiable for the dealer to be compensated for sales into his territory by the contract supplier.⁸¹ Further it is legitimate for one dealer to compensate another dealer for documented expenses and gratuitous after-sales services performed by the dealer whose territory has been "breached".⁸² Such payments may be made in lump-sum form provided they are reflective of actual costs and do not seek to provide a cover for a compensation system which inhibits parallel supplies. See below on the free rider problem for cases where compensation clauses may be permissible.

(iii) Prohibitions on "Cross deliveries"

Cross delivery bans are usually treated as obstacles to parallel imports. These are bans on a dealer selling to any other dealer (but not non-dealers) at the same level of distribution.⁸³ The prohibition may extend to bans on cross-deliveries at all levels of distribution.⁸⁴ If the ban on cross-deliveries covers only non-dealers (e.g. wholesalers) and allows deliveries to other dealers this is still within Article 85(1) though limited bans of this nature do sometimes obtain exemption under Article 85(3).⁸⁵

Where prohibitions on "skip deliveries" are concerned (ban on deliveries between general importer and consumer which jump or "skip" over intermediaries e.g. wholesalers, retailers) the Commission adopts the view that such restrictions are exemptable especially when confined to parties in a single Member State. They confine each party to specific roles in the distribution chain and by enforcing the division of work between the parties seek to guarantee that the distribution system operates effectively.⁸⁶

"Reverse" or "back delivery" clauses which ban the dealer from supplying up the distributional chain, e.g. retailer to wholesaler, will rarely be tolerated. Such transactions are, by their very nature, abnormal so will only occur where there is good economic reason for them, for example, where it is profitable, due to steep price differentials, for a dealer in one Member State to supply a wholesaler in another. Such transactions are hence in Commission terms beneficial to the elimination of price differences between Member States. Bans can probably not be justified, as can bans on skip-deliveries, by reference to improvements in the distribution system.

(iv) Restrictions on the provision of After Sales Services

This causes problems where a supplier bans dealers from affording services to purchasers of his brand acquired outside of the dealers territory. Thus, if customer X purchases a Ford car in Belgium and, on bringing it back to the UK, discovers that Ford dealers in the UK refuse to provide after sales services or provide them only at discriminatory prices, this will operate as a disincentive to X and other prospective customers from purchasing outside of the UK. The Commission now requires manufacturers to require their dealers to include parallel imported goods in their customer services and guarantees.⁸⁷

(v) Monitoring clauses

Clauses which require dealers to report back to the supplier details of sales including receipts, invoices, sales-slips etc. may be illegal if their purpose is to afford the supplier a means of discouraging the dealer from selling outside of his territory. Thus, if supplier X marks his goods with serial numbers (e.g. 0-10,000 in France; 10,001-20,000 in Germany etc.) he will be able to monitor the sales patterns of the goods. If a product numbered 11,500 is presented for servicing in France X will know that it has been sold in

France although it was distributed by a German dealer, X may then impose pressure on the German dealer to prevent him exporting to France.

(vi) Restrictions on the dealers freedom to advertise outside of his territory and to actively seek customers

These are generally exempted. Indeed, such a clause is permitted under Article 2(2)(c) of Regulation 83/83/EEC (see above). Exemption will never lie however where an absolute ban on external sales is imposed; the legal restraint is only on actively seeking customers elsewhere. Thus dealers must remain free to meet unsolicited demands (passive sales).

IV. The "Freerider" problem: protecting promotional investments⁸⁸

Suppliers of luxury or technically complex goods face a problem if they wish to require dealers to take expensive promotional measures. Parallel importers bringing into the territory the suppliers brand of goods can rely on the contract dealers promotional measures to release him from the obligation to undertake his own promotion: customers may use the facilities available at the contract dealers showroom and, having done the market research, purchase from the parallel importer who can afford to undercut the dealer. Parallel importers thus take a "free ride" on the backs of the contract dealer. In this situation there is a theoretical conflict which the Commission has not yet come fully to terms with. The free-rider problem raises a possible justification for territorial restrictions and, as such, is of importance to those setting up or running distribution networks.

View I: The parallel importer (the free-rider) undertakes a valuable service because he fosters the free circulation of the brand of goods thus contributing to market integration. Furthermore, he helps break down price differentials by moving goods from cheap areas into expensive areas undercutting the price there and contributing to the downward movement of prices.

View II: Parallel importers who free-ride are dangerous to integrational forces. By parasitically reaping where they have not sown free-riders reduce the incentive for contract dealers to maintain expensive advertising, display, demonstration, stocking, maintenance and repair facilities. This means that the suppliers goods are not marketed so efficiently and hence ultimately the goods are less competitive.

View I justifies a strict proscription of measures hindering parallel imports; View II justifies a more relaxed attitude towards some measures hindering parallel imports. What is the attitude of the Commission? It is clear that the Commission are sensitive to the free-rider problem and have on occasion allowed restrictions ostensibly upon its basis.⁸⁹ It is arguable upon the basis of these cases that restrictions justified by reference to the free-rider problem will, in certain narrow circumstances, be accepted by the Commission. Thus, where a new manufacturer or a small or medium sized manufacturer seeks penetration of a market and requires dealers to take expensive promotional steps then protection against parallel importers may be necessary if effective market penetration is to occur.⁹⁰ On this basis territorial restraints are compatible with market integration theories. However, given the orthodox opposition to territorial restraints parties relying upon the free rider argument must satisfy the Commission that free riding is a real problem and a serious obstacle to their penetration. Moreover, that any restriction on a dealer selling outside of his territory or supplying anyone likely to parallel import the goods to another dealers territory, satisfies Article 85(3) EEC. Given the opposition to territorial restraints this will be no easy task.⁹¹ Whilst the Commission are unsympathetic to export bans they are more sympathetic to less extreme clauses. For example:

- clauses giving dealers areas of primary responsibility;
- clauses preventing the setting up of warehouses or retail outlets outside of the contract territory but which do not prohibit the satisfying of unsolicited orders;⁹²
- compensation clauses providing for payment by the exporting dealer of certain types of compensatory sums to the dealer in whose territory he sells (see above).

E. EXCLUSIVE DEALING IN UNITED KINGDOM LAW⁹³

I. Under the RTPA 1976

Most exclusive dealing agreements are excluded from the RTPA under Schedule 3(2) of that Act. Where services are concerned Schedule 3(7) is the analogous provision. Reference to Chapter 2 Section I should be made for analysis of those provisions. An agreement so exempt is subject to the Competition Act 1980.

It must be stressed that if an agreement is not drafted so as to benefit from exemption it must be furnished to the OFT for registration on the register of restrictive trade practices. Failure to notify in due time means that the restrictions are void and unenforceable.⁹⁴ If a dispute between supplier and dealer arises the restrictions are unenforceable in Court and failure to register is a line of defense that either of the parties may raise.⁹⁵

Most agreements, if registered, will be susceptible to dispensation under Section 21(2) RTPA 1976 (for analysis see Chapter 4).⁹⁶ The OFT might require the parties to modify certain clauses though much will depend upon the OFT's assessment of the market. The following are a few pointers:

- (i) If inter-brand competition is weak i.e. the supplier has few real competitors the OFT will take a stricter line with exclusive territories. They will be keen to ensure that competition within the brand remains keen and dealers of that brand can compete with each other. Accordingly, the OFT might consider whether the dealers exclusive territory is too widely drawn.
 - (ii) Agreements between various dealers of the same brand must be registered under the RTPA. If dealers agree not to compete with each other or fix selling prices there will be very little chance of Section 21(2) dispensation.
 - (iii) If suppliers seek to enforce the price at which the dealer sells this may be in reach of the Resale Prices Act 1976 and no Section 21(2) dispensation will lie. The only exceptions may be for agreements concerning books or certain medicines (see Chapter 8 section H)
- In assessing a registrable agreement the OFT will not take into account restrictions or terms which are disregardable under Section 9 or 18 RTPA 1976 (see Chapter 1 Section E). Though, in furnishing details of the agreement these must be included.

II. Under the Competition Act 1980

Agreements exempt from the RTPA 1976 may be reviewed under the Competition Act 1980 (CA 1980). The criteria for assessment here will not differ significantly from those under the RTPA 1976. Though, when assessing the effect of an agreement under this Act the OFT will consider the effects of restrictive clauses that would otherwise have been exempt under the RTPA. Two cases involving exclusive concessions are of interest here.

⁹⁷
In British Railway Board (Facilities for Car hire and advertising of self-drive vehicle hire at railway stations) British Rail (BRB) granted an exclusive right to Godfrey Davis (Car Hire) Ltd. (GD) to operate at British Rail stations. BRB sought to operate a "Rail-Drive Scheme" which coupled rail and road travel facilities together thereby easing the travel burden of passengers who, on arrival at a station, found themselves distant from their destination. GD provided car-hire services at a large number of stations, only about 50% of these were profitable. This was an essential point. The parties argued to the OFT that the potential volume of Rail-Drive business was inadequate to support more than one national operator profitably. Moreover, they argued that if rival operators were allowed to establish facilities in competition with GD it was likely that they would concentrate on those stations with a relatively high demand for car hire. In such circumstances GD would not be able to maintain the Rail-Drive Scheme since it would not earn sufficient from profitable stations to be able to cross-subsidise the unprofitable stations. Cross-subsidisation between stations was necessary if GD were to be able to provide and maintain services at unprofitable stations.

In their analysis the OFT, whilst recognising the economic logic of the parties arguments, were concerned the system as operated by BRB and GD affected the ability of other car-hirers (e.g. Hertz and Avis) to compete: "BRB has a monopoly of the facilities which can be offered to commercial undertakings at railway stations. It is therefore inevitable, given that exclusivity is necessary for BRB's Rail Drive Scheme in its present form, that the current operator should derive advantages over its competitors. In the view of the Office, the various advantages that [GD] obtains are such as to affect the ability of firms other than GD to compete in the relevant market. The arrangements between BRB and GD , which maintain exclusive rights in respect of the provision of self-drive car hire facilities at railway stations, are therefore, anti-competitive."⁹⁸ However, despite this finding the OFT concluded that the practice was insignificant. The value of the relevant market was assessed at £60m; the value of trade diverted by the BRB-GD agreement was only £2m, i.e. about 3-4% of the total market. No reference was thus made to the MMC.

Before itemising the practical relevances of this case another case, on similar facts, deserves mention. In British Airports Authority⁹⁹ (arrangements for the provision of chauffeur-driven hire car services at Gatwick airport) the Authority granted an exclusive franchise to a single

car-hire firm to provide facilities at Gatwick airport. In this case there were no compelling economic arguments such as existed in the British Railways Board case to justify the agreement. Accordingly, it was held to be anti-competitive and suitable for reference to the MMC.

The following important points derive from these cases:

(i) Arguments the OFT may not consider

The OFT accept that exclusive dealing may have beneficial consequences. In British Airports Authority they listed these advantages:

- "(i) control of the quality and type of goods or services provided, particularly where corporate identity associated with the goods is important;
- (ii) increased operational efficiencies and improved resource allocation arising from, for example, predictability of supply and/or demand or benefits of sale."¹⁰⁰

However, they continued: "It should be noted, however, that these effects, if present, are essentially questions of public interest, and do not bear directly on the question of whether the arrangement is anti-competitive."¹⁰¹ Thus, arguments about the economic benefits of an agreement are public interest arguments to be left to the MMC. This cannot be an absolute rule. It must be open to parties to argue for example that the agreement by enhancing a suppliers distributional system enhances inter-brand competition and, a fortiori, intensifies competition.

(ii) Importance of market analysis and inter-brand competition

In British Airports Authority the OFT stated:

"Exclusive concessions or franchises are not necessarily anti-competitive. This will depend on the structure of the market in which the restriction on the ability to supply the particular good or service occurs, and a concession is unlikely to be anti-competitive if there is competition in the relevant market (for example if substitutes are available for the particular good or service). Where there is little or no competition in the market, an exclusive concession or franchise is likely to be anti-competitive. In these circumstances the terms and conditions under which the franchise is granted may nevertheless eliminate the effects that might arise from the lack of competition. For example competitive tendering at suitable intervals between parties able to supply the goods or services might eliminate the effects of lack of direct competition in the relevant market. Alternatively the concession agreement might include controls or conditions aimed at simulating the effect that might be predicted to arise from competition."¹⁰²

Thus tolerance by the OFT is likely only where inter-brand competition is strong. Where it is not parties must take special care to avoid anti-competitive effects.¹⁰³

(iii) De Minimis

An agreement that on the face of it is anti-competitive may, when the market context is considered, turn out to be insignificant. In British Railways Board the OFT found that the exclusive right given to GD was anti-competitive. However, the total value of the agreement to GD was small when compared with the total value of the relevant market (about 3-4%). Accordingly, there was no need to refer the agreement to the MMC.¹⁰⁴

(iv) The importance of Market definition

Parties negotiating with the OFT must analyse with care the relevant market. The wider the market the less important becomes the investigated conduct. In British Railways Board it was the relatively wide definition of the relevant market which enabled the OFT to apply the de minimis rule and refrain from referring the agreement to the MMC.¹⁰⁵

F. EXCLUSIVE PURCHASING AGREEMENTS IN GENERAL

This section examines exclusive purchasing agreements whereby a dealer agrees to purchase his total requirement of a particular product from one supplier. The dealer is not given an exclusive territory in which to operate. Also covered, though more briefly, are requirements clauses whereby the dealer agrees to purchase a fixed percentage of his requirements from a supplier. Both types of clause are sometimes called tie-clauses since the dealer agrees to tie himself to a specific dealer.

I. General Considerations

(i) Attitude of OFT and EEC Commission

In both jurisdictions exclusive purchasing is recognised as a beneficial contractual relationship and statutory exemptions are provided for agreements satisfying certain criteria. In the UK exemption is afforded by Schedule 3(2) and (7) RPA 1976 for goods and services agreements respectively. In EEC law exemption is found in Regulation 84/83/EEC which applies Article 85(3) to certain categories of exclusive purchasing agreement.

Agreements not falling within these exemptions are not void. They must be submitted to the relevant authorities and negotiated over on an individual basis. In the UK agreement may obtain individual exemption from reference to the Restrictive Practices Court under Section 21(2) RTPA 1976 (see Chapter 4 for details). In the EEC the Commission may grant individual exemption under Article 85(3) EEC or, more likely, issue a comfort letter stating that the Commission have no objections and are closing the file on the Agreement.

It is relevant to note that an agreement exempt under Schedule 3(2) or (7) RTPA 1976 is subject to the Competition Act 1980

(ii) Economic Arguments in favour of purchasing agreements

Exclusive purchasing agreements are recognised as having beneficial effects. These are described below.

Exclusive purchasing may lead to distributional improvements. Paragraph 5 of the preamble to Regulation 84/83/EEC reads:

"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 risks to them of variations in market conditions and to lower distribution costs."¹⁰⁶

These distributional improvements should be felt by consumers who are able to obtain the contract goods more quickly and more easily.

The benefits should be ensured by the intensification of competition that such agreements can lead to. First, the dealer is obliged to concentrate his sales efforts on one brand of goods thereby maximising their sales potential. This enhances competition between different brands of goods. Secondly, exclusive purchasing may be the only means by which a supplier might penetrate a market and compete with other manufacturers already present. Thus exclusive purchasing provides an avenue into a market and increases competition therein. Thirdly, suppliers often contribute to the cost of improving or expanding the distribution network which is accordingly rendered more effective.¹⁰⁷

(iii) Economic arguments against purchasing agreements

The principal problem in connection with purchasing agreements is "foreclosure". One of the likely effects on competition of exclusive buying requirements is that they may lead to a restriction of competition in that, if a supplier imposes exclusivity on any person, other suppliers and potential customers may be hindered or prevented from competing for that person's custom and part of the market may thus be closed to them.

"Foreclosure" thus describes the market whereby appropriate dealers are, by virtue of being tied to specific suppliers, foreclosed from other suppliers who seek representation for their goods. The existence of whole networks of such agreements operated by a number of suppliers may prove an insurmountable barrier to entry to a new manufacturer trying to penetrate a market but who is unable to find suitable dealers. In such cases it is only if the supplier can afford to set up his own retail network that he may penetrate the market. Few suppliers can afford such an expensive commitment.

A second problem is that purchasing agreements tend to encourage a rigid market structure. Not only do they hinder entry by other firms, they also hinder expansion by existing firms. If dealer X is tied to supplier Y for 5 years the other existing suppliers are denied the chance of sales to X for the duration. During that period Y might become less efficient; rivals might become more efficient, yet such changes in efficiency are not reflected in sales to X who is locked-in to an inefficient supplier.

Prices are an everpresent problem. In the example given above Y might be over-priced by comparison to rivals. However, X must still purchase from Y because of the five year exclusive purchasing tie. Consumers of X will thus suffer because they will not receive the benefits of the lower prices that would have been charged them were X free to switch his suppliers.

G. THE BLOC EXEMPTION FOR EXCLUSIVE PURCHASING
IN EEC LAW

Some businessmen, and indeed legal advisers, have problems in legally differentiating an exclusive dealing from an exclusive purchasing agreement. The essential difference is as follows. In an exclusive dealing contract the dealer is given an exclusive territory in which he alone enjoys the contractual right to sell his suppliers brand of goods. In an exclusive purchasing agreement the dealer is not given an exclusive territory; the supplier may enter agreements with as many dealers in a territory as he sees fit. The nub of an exclusive purchasing agreement is that the dealer agrees to take supplies exclusively from a single supplier.

Exclusive purchasing does not figure largely in international commerce. Where trade between Member States is concerned it is much more usual to find exclusive distributorship agreements with the dealer possessing an exclusive territory. Where purchasing agreements do exist they tend to be between manufacturers or wholesalers and specific retailers. Such agreements are, it follows, invariably domestic in character with both parties deriving from the same Member State. However, the Court of Justice has indicated that exclusive purchasing agreements between parties in a single Member State can effect trade between the Member States so as to trigger the application of Article 85(1) EEC.¹⁰⁸

I. Introduction: Interpretation

The points concerning interpretation made in respect of Regulation 83/83/EEC on exclusive dealing above apply, mutatis mutandis, to Regulation 84/83/EEC on exclusive purchasing agreements.

II. Article 1: Basic provision

Article 1 of the Regulation reads:

"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."

For commentary upon the meaning of: "for resale"; "goods"; "only two undertakings are party"; and, "agreement", see above in respect of Article 1 of Regulation 83/83/EEC on exclusive dealing. In the discussion below certain other features of Article 1 of Regulation 84/83/EEC are described.

(i) The exclusive purchasing obligation: the main restriction

The core of Article 1 permits an agreement involving two parties 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".

Thus: a dealer may agree to purchase only from one manufacturer; a wholesaler may agree only to purchase from one manufacturer; a dealer may agree only to purchase from one wholesaler; a dealer may agree with a manufacturer to purchase only from a specified wholesaler.¹⁰⁹

(ii) Exclusive purchase: restriction must be total

To be exempt there must exist an exclusive purchase requirement. The Commission adopt the view that a partial requirement is not exempt.¹¹⁰ Thus, if X agrees to purchase 80% of his requirement from supplier Y and the remainder from other suppliers such an agreement must be notified to the Commission.¹¹¹ This might seem a strict approach to adopt. However, it is justified in the preamble to the Regulation on the basis that total exclusivity is necessary to ensure the distributional benefits the agreement may bring:

"... 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 also present; whereas this is particularly so in the case of small and medium-sized undertakings"¹¹²

A less than absolute restriction is thus not exempt. A clause granting the dealer an end of year rebate (fidelity rebate) if he takes 100% of his requirement from a specified supplier is not an absolute restriction although it might result in a dealer taking all of his supplies from one undertaking. The clause does not require exclusivity.

(iii) English Clauses

However, the Commission do permit so called "English clauses" to be incorporated which reserve to the dealer the right to obtain the contract goods (not competing goods) from other suppliers should these sell at prices which are cheaper or on terms which are more favourable than the main supplier.¹¹³ If the Commission accepts that such a clause is exempt they will presumably further accord exemption to a monitoring or verification clause whereby the dealer is required to notify the main supplier or provide him with copies of receipts, invoices, orders etc. of purchases from other suppliers of the contract goods.¹¹⁴

(iv) Release Clauses

Release clauses permitting the dealer to purchase elsewhere should the supplier be unable to supply are, in the Commission's view, also exempt.¹¹⁵

(v) Brand or denomination mark

The contract goods must be specified by brand or denomination in the agreement. The Commission consider that such precision is necessary for the agreement to accurately define the scope of the dealers exclusive purchasing obligation (in Article 1) and of the ban on dealing in competing products (in Article 2 discussed below).

It may be reiterated that no exclusive territory may be accorded the dealer. Incorporation of an exclusive territory takes the agreement out of Regulation 84/83/EEC and places it within the domain of Regulation 83/83/EEC.

III. Article 2(1): Permissible restrictions on supplier, non-competition clauses

Article 2(1) permits the supplier to be restrained contractually from distributing the contract goods or goods which compete with the contract goods in the dealers "principal sales area" and at the dealers "level of distribution". "Principal sales area" means, according to the Commission, the geographical area covered by the dealers "normal business activity".¹¹⁶ This is not a very precise test. Many dealers will have a reasonable idea of their catchment area but will probably not be able to define it with precision. It might be prudent to define what is the dealers principal sales area in the contract. This would bind the supplier (not to sell within it) but would not, of course, bind the dealer (not to sell outside it). Any

attempt by the supplier to prevent the dealer from selling outside of the principal sales area will result in withdrawal of the exemption in Regulation 84/83/EEC and place the agreement within Regulation 83/83/EEC on exclusive dealing. Moreover, whilst the supplier may be prohibited from selling within the principal sales area, he cannot be prohibited from either appointing other dealers in the area, or, supplying dealers outside the area who will import the goods into the area.¹¹⁷

"Level of distribution" in Article 2(1) relates to a permissible obligation on the supplier not to distribute the goods or competing goods at the dealers level of distribution. The dealer may be a wholesaler or a retailer or even a rival manufacturer in certain narrow circumstances (see Article 3(b) noted below). If the dealer is a wholesaler and a retailer (e.g. the "cash and carry" or "open warehouse" type of sales point) then presumably the supplier may be refrained from selling at both those levels.¹¹⁸

IV. Article 2(2) and (3): Permissible restrictions on the dealer

(i) Article 2(2): non-manufacture or distribution

Article 2(2) permits a restriction on the dealer from either manufacturing or distributing goods which compete with the contract goods. The Commission stress that the contract goods should be clearly specified by brand or denomination in the agreement so as to clearly delimit the dealers obligations.¹¹⁹

For a definition of goods which compete reference should be made to Article 3 which speaks of "goods which are considered by users as equivalent in view of their characteristics, price and intended use." This definition has been analysed in respect of Article 3 of Regulation 83/83/EEC on exclusive dealing and readers should refer to the discussion on that provision above.

(ii) Article 2(3)(a): complete ranges of goods

The supplier may require the dealer "to purchase complete ranges of goods". This is similar to Article 2(3)(a) of Regulation 83/83/EEC on exclusive dealing. It is implicit here that a "range of goods" means a range of goods which are by their nature or commercial usage connected to each other. If they are not so connected an agreement requiring a purchaser to take the goods exclusively from one supplier is not exempt. This is expressly stated in Article 3(c) (below)¹²⁰

(iii) Article 2(3)(b): minimum quantities of goods

The supplier may require the dealer to "purchase minimum quantities of goods which are subject to the exclusive purchasing obligation". Thus the dealer may be contractually required to take certain quantities of the goods. This may, depending upon the quantities, impose pressure on the dealer to promote those goods vigorously.

(iv) Article 2(3)(c): trademarks and packaging

The wording of Article 2(3)(c) is exactly the same as under Article 2(3)(b) of Regulation 83/83/EEC on exclusive dealing and reference thereto may be made for commentary.

(v) Article 2(3)(d): measures for promotion of sales

The wording of Article 2(3)(d) is exactly the same as under Article 2(3)(c) of Regulation 83/83/EEC on exclusive dealing and reference thereto may be made for commentary.

(vi) Other restrictions are not permissible

As with Regulation 83/83/EEC on exclusive dealing no other restrictions are allowed other than those stated in the exclusive purchasing Regulation. Article 8 of the preamble states:

"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."

It may be assumed that a restriction which is not expressly exempted but which is ancillary to, and in reality within the ambit of, another restriction which is expressly exempt, is exempt by analogy. Thus for example it is expressly provided that the dealer may be required to take promotional measures. It should also be permissible to impose on the dealer notification or 'reporting back' obligations which do no more than enable the supplier to monitor the effectiveness of the promotional measures.

V. Article 3(a) and (b), non-exempt restrictions: competing manufacturers agreements

Article 3(a) provides that no exemption exists for reciprocal exclusive purchasing agreements. Thus if manufacturer X agrees to purchase exclusively from rival manufacturer Y who, in turn, agrees to purchase exclusively from X, the agreement must be individually negotiated over with the Commission. Article 3(a) is, mutatis mutandis, the same as Article 3(a) of the exclusive dealing Regulation and reference thereto should be made for commentary.

Article 3(b) provides a limited exemption where one or both of the parties has a total annual turnover of no more than 100 million ECU and the agreement is non-reciprocal. For discussion see text on Article 3(b) of the exclusive dealing Regulation. The same applies to the definition of 'turnover' in Article 5 and the definition of 'connected undertaking' in Article 4.

An example of a non-reciprocal agreement not obtaining bloc-exemption but obtaining specific exemption is Carlsberg.¹²¹ Carlsberg who are Danish lager producers, in an attempt to meet expanding demand for its product in the UK, entered a series of agreements with Watney Mann Ltd. who are beer producers and its parent company Grand Metropolitan (GM). The UK company agreed to distribute Carlsberg lager through its network of tied public houses. They also agreed that they would produce, under license, Carlsberg lager in the UK for the UK market. Under the agreement GM agreed to purchase a specified, large volume of beer from Carlsberg for the currency of the agreement (until 1991). This volume was variable according to a formula related to GM's volume of sales of Carlsberg lager.

The Commission granted Article 85(3) exemption. They premised their decision upon the peculiar structure of the British beer market which was trending towards oligopoly with seven large brewing groups controlling over 80% of the market and which was characterised by very widespread brewery ownership of sales outlets. In view of this the Commission recognised the need for the agreement as a vehicle by which Carlsberg could penetrate the UK market. The consumer benefited from the agreement in that it ensured that supplies of Carlsberg lager in the UK were more plentiful fresher and also cheaper because of the considerable cost of transporting a heavy commodity like beer over large distances.

VI. Article 3(c), non-exempt restrictions: clauses tying together unconnected goods

No exemption where,

"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."¹²²

This provision may be seen as a limitation on Article 2(3)(a) discussed above which permits the supplier to require the dealer to take complete ranges of goods.¹²³

No definition is given of "type of goods". However, the Commission consider three factors, at least, to be relevant. First, the existence of a technical relationship may be sought. A technical relationship may exist between a machine, accessories to it and spare parts for it. For example: a main-frame computer may be technically linked to plug compatible accessories; a stereo system may be linked to tuners and cassette decks of the same brand.¹²⁴ It follows that products may be technically related even though alternative products may be used in conjunction with them. Thus, memory capacity manufactured by Memorex may be used in conjunction with a main-frame IBM 370 computer.¹²⁵ Thus, a Sony cassette deck may be used in conjunction with a Hitachi record player. Secondly, the existence of a relationship based upon commercial grounds. A commercial nexus may exist between several products used for the same purpose. Thus cassette tapes, records and compact discs are different products, but may be used for the same purpose. Thirdly, the existence of a relationship based upon trade usage may be sought. Such a link will be found between different goods that are customarily found together. In determining what is trade usage reference should be made to what is common amongst all relevant dealers at the contract dealers level of trade. What is common and usual for the contract dealer need not be common for other dealers. Precisely how common the trade usage must be is not specified. Would a tie-in that was common in a specified region (due to historical custom) but which was rare outside of that region be acceptable? If in doubt parties should notify the Commission requesting the latter to declare, in a comfort letter, whether its agreement complied with the Regulation. It is understood that the Commission will endeavour to respond rapidly to such requests for guidance.¹²⁶ In determining what is common trade usage note may also be taken of the prevailing situation in other forms of distribution, e.g. in franchise systems.

Exclusive purchasing agreements covering goods which do not "belong" together can only be exempted by an individual decision.¹²⁷

VII. Article 3(d): time limits for duration of agreement

Article 3(d) provides that no exemption exists where,
"the agreement is concluded for an indefinite duration or for
a period of more than five years."

Where an agreement concerns beer or petroleum products different rules apply, see below.

The Commission have stated that agreements which specify a fixed term but which are automatically renewable unless one of the parties gives notice to terminate are considered to have been concluded for an indefinite period.¹²⁸ It should be that agreements incorporating five year "break clauses" are exemptable i.e. a clause providing that the contract shall be renegotiated every five years and that the dealer shall have the right to terminate and seek supplies elsewhere. Such a break clause might simply provide that either side may give notice of one year after the first four years and, thereafter, after four years into each contract.

VIII. Article 14: withdrawal of exemption from automatically exempt agreements

Article 14 is similar to Article 6 of Regulation 83/83/EEC on exclusive dealing. It empowers the Commission to withdraw by formal decision the exemption from an agreement that is otherwise exempt. The enumeration in Article 14(a)-(c) contains examples only; it is non-exhaustive.

Article 14(a) is similar to Article 6(a) of Regulation 83/83/EEC. It allows the Commission to withdraw exemption where the contract goods are not subject "in a substantial part of the Common Market" to effective competition from competing goods. The Commission are concerned that inter-brand competition should remain effective. The meaning of "in a substantial part of the Common Market" is unclear. Though, the phrase only has relevance when the Commission decide to issue a formal decision so that there will be ample scope for parties to present their views on the meaning of the phrase .

Article 14(b) is similar to Article 6(b) of Regulation 83/83/EEC. i.e. Commission may withdraw exemption where rival suppliers encounter significant problems of access to suitable dealers. Reference should be made to commentary on the foreclosure argument above. The problem is that the existence of whole networks of exclusive purchasing agreements makes it

extra difficult for a new supplier to find and appoint well-qualified dealers since those that exist may already be tied up in contractual arrangements with suppliers. There is some debate as to when foreclosure is objectionable. Clearly, the Commission may withdraw exemption if it discovers that existing suppliers are using exclusive purchase agreements as a device to keep out new firms. However, if the existence of widespread networks is due entirely to the efficiency of the suppliers already in the market are those firms to be punished for their efficiency? The argument that any foreclosure effects are entirely due to the efficiency of existing firms **may** be made to the Commission should the latter threaten withdrawal of exemption.

Article 14(c)(1) provides for withdrawal of exemption where the supplier "without any objectively justified reason" refuses to supply categories of dealer who cannot obtain the contract brand of goods elsewhere on suitable terms, or can only obtain supplies on discriminatory terms. This provision has a counterpart in Article 6(d)(1) of Regulation 83/83/EEC and reference thereto may be made for commentary. Article 14(c)(2) provides for withdrawal of exemption where the supplier discriminates in terms of price or terms and conditions in sales against dealers tied by an exclusive purchase clause than he does when compared to dealers who operate at the same level of distribution as the tied dealers. Could a tenant/dealer in a public house complain that his supplier sells to supermarkets cheaper than to him? Almost certainly not. Article 14(2) permits discrimination where it is "objectively justified": cheap supplies to a supermarket may well be justified upon the basis of scale economies.

IX. Article 15: Transitional periods: time limits for compliance

Under Article 15(1) all agreements which were concluded and which entered into force before 1 January 1984 remain covered by the exemption in Regulation 67/67/EEC (the predecessor Regulation) until 31 December 1986. From 1 January 1987 all agreements seeking bloc-exemption must comply with the Regulation.

Different rules apply to beer supply and petrol supply agreements (see below).

See below at XII.

X. Article 16: No overlap with the exclusive dealing Regulation

Article 16 provides that Regulation 84/83/EEC shall not apply where the supplier grants the dealer an exclusive territory and the dealer concludes an exclusive purchasing clause with the supplier. Such contracts are governed by the exclusive dealing Regulation 83/83/EEC. Exclusive purchasing agreements do not have an exclusive territory.

XI. Article 17: Mixed agreements not exempt

Regulation 84/83/EEC divides into 3 parts. Part I concerns general agreements; Part II concerns beer supply agreements; Part III concerns petrol supply agreements. An exclusive purchase agreement whose subject matter spans more than one part is not exempt. It must be notified to the Commission for individual exemption.

XII. Agreements must not be extended

The Commission, in paragraph 66 of their explanatory notice state: "Parties lose the benefit of application of the transitional provisions if they extend the scope of their agreement as regards persons, places or subject matter, or incorporate into it additional obligations restrictive of competition. The agreement then counts as a new agreement. The same applies if the parties substantially change the nature or extent of their obligations to one another. A substantial change in this sense includes a revision of the purchase price of the goods supplied to the reseller or of the rent for a public house or service station which goes beyond mere adjustment to the changing economic environment."

XIII. Exclusive purchasing and beer supply agreements: tied houses, Articles 6-9¹²⁹

Two sectors of the economy raise particular problems - tied public houses and tied petrol filling stations. Accordingly, these have special rules governing them. Articles 6 - 9 of Regulation 84/83/EEC cover beer supply (tied public house) agreements. If a beer supply agreement fits the criteria of the Regulation it need not be notified and it obtains bloc-exemption. Agreements not within the Regulation must obtain individual blessing from the Commission. In the commentary below the publican whether he is a premises owner or tenant or whatever is described as the "dealer".

(i) Basic provision

Article 6(1) reads:

"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 the according of special commercial or financial advantages, to purchase only from the supplier, an 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."

The beers and other drinks must be specified by brand or denomination in the agreement. The exclusive purchasing agreement can only be imposed on the dealer for drinks which the supplier carries at the time the contract takes effect and provided that they are supplied in the required quantities, at sufficiently regular intervals and at prices and on conditions allowing normal sales to the consumer. The Commission consider that an extension of the agreement to cover drinks not specified in the agreement will necessitate the entering of an addition agreement satisfying the terms of the Regulation. Though, a change in the brand or denomination of a drink specified in the agreement does not affect the exemption. Thus if the agreement excludes brandy and this is to be included then a new agreement must be drafted. If the agreement already includes brandy but the supplier intends to switch brands then a new agreement is not required.¹³⁰ Similarly, a supplier may conclude an agreement with a dealer with respect to a number of outlets controlled by the dealer. The names of the outlets must be specified in the agreement.

If the parties subsequently decide to add new premises to the agreement the extension must be the subject of a new exempt agreement. Though, presumably, if the parties decide simply to extend an existing premises or change its address no new agreement is needed. This is not a change materially influencing the scope of the agreement.¹³¹

'Premises' means any premises used for the sale and consumption of drinks. This includes private clubs. However, exclusive purchasing agreements between suppliers and off-licences are governed by the ordinary rules on Exclusive purchasing (Articles 1 - 5).¹³²

"Special commercial or financial advantages" includes, inter alia: the grant of loan finance on favourable terms; obtaining for dealers loan finance on favourable terms; equipping dealers with a site or premises for conducting the business; the provision of equipment, fixtures and fittings; the undertaking of investments e.g. with respect to improvements or extensions of the premises for the dealers benefit etc.¹³³ These are only examples. The Commission define "special commercial or financial advantages" as "... those going beyond what the [dealer] could normally expect under an agreement".¹³⁴ In any given case the Commission point to the nature, extent and duration of the obligations undertaken by the parties as relevant. Trade usage will also be a very important factor. It should be stressed that the rationale for these "special" advantages is as consideration for the tie i.e. the exclusive purchasing obligation.

Article 6 exempts agreements where the dealer contracts with a brewery in respect of specific types of beers and with a wholesaler in respect of beers of other types and/or other drinks. The two agreements may be combined into one document.¹³⁵ This extends the exemption to situations whereby the wholesaler is an agent of the supplier or whereby a dealer accredited by the supplier acts as a supplier to the dealer. It also exempts agreements whereby a subsidiary of the supplier acts as a supplier to the dealer. The Commission accept further that a wholesaler can operate as the main suppliers agent to an extent by concluding the contract with the dealer on the main suppliers behalf as well as concluding a contract with the dealer on his own behalf. The wholesaler may undertake delivery of all the drinks.

Can these various contracts concluded between the three parties be incorporated in a single agreement? Article 6 speaks only of agreements "to which only two undertakings are party". However, if the wholesaler is a subsidiary of or is otherwise "connected" (within the meaning of Article 4 of the Regulation) to the main supplier then they may be viewed together as a single entity. The Commission seem to consider that the various agreements (dealer/main supplier, and, dealer/wholesaler) may be incorporated in a single document. If the main supplier and the wholesaler are not connected together then it is probably safest to conclude two separate contracts ensuring that both are exempt under the Regulation. It should be remembered that

Regulations are directly applicable and may be pleaded before national courts. If a question of the interpretation of Article 6 arose before a national Court the Commission's view as expounded in the explanatory notice, whilst persuasive, is not binding on the national Court. Consequently, if in doubt compliance with Article 6 may be ensured by drafting two agreements both of which contain only two parties.

Article 6(2) of the Regulation extends Article 6(1) by providing that the latter provision also applies where the exclusive purchase requirement is imposed on the dealer in favour of the supplier "... by another undertaking which is itself not a supplier". This covers a number of situations. First, as noted above, the exemption extends to a wholesaler who contracts with a dealer on a main suppliers behalf. Secondly, where a supplier affords financial or other assistance to the owner of premises to help in equipping them as a public house or restaurant etc. and in return the owner imposes on his tenant an exclusive purchase obligation in favour of the supplier then Article 6(2) guarantees bloc exemption. Thirdly, as in the second example but with the owner imposing the obligation on a successor in title.¹³⁶

(ii) Article 7: Other permissible restrictions on dealer

Article 7 is expressed to be exhaustive of the restrictions that may be imposed on the dealer. The imposition of additional restrictions necessitates the obtaining of individual exemption from the Commission. Though Article 9 does provide that, inter alia, Article 2(3) shall apply also. Article 2(3) it will be recalled covers various additional obligations, for example, advertising and promotion requirements. Article 2(3) has an almost exact counterpart in Article 2(3) of Regulation 83/83/EEC on exclusive dealing. Commentary on these provisions should suffice for purposes of Article 9 of the Regulation on beer supply agreements.

Article 7(1)(a) permits the dealer to be restrained from selling competing beers and other drinks which are of the "same type"¹³⁷ as those covered by the contract in the premises designated in the contract. The Commission state that this obligation applies only where the supplier is capable of meeting the demand anticipated by the dealer. This expression of Commission policy though sensible goes beyond the strict letter of Article 7(1)(a) however it does give an indication of how the Commission will respond. In action before a Court it will not be considered binding.

Article 7(1)(b) entitles the dealer to sell beers of other types in draught form if the other party has tolerated this in the past. If this is not the case the dealer must establish that there is a "sufficient demand" from customers to warrant the sale of other draught beers. The demand will be deemed sufficient in the Commission's view "if it can be satisfied without a drop in sales of the beers specified in the exclusive purchasing agreement. It is definitely not sufficient if sales of the additional draught beer turn out to be so slow that there is a danger of its quality deteriorating. It is for the [dealer] to assess the potential demand of his customers for other types of beer; after all, he bears the risk if his forecasts are wrong".¹³⁸ Article 7(1)(b) also permits the supplier to require the dealer to sell competing beers supplied by other undertakings only in bottles, cans or other small packages. Thus speciality beers may be sold but not in a form directly competing with the main suppliers beers.¹³⁹

Article 7(1)(c) permits the imposition of advertising restrictions on goods supplied by other undertakings within or outside the premises though they may be advertised "only in proportion to the share of these goods in the total turnover realized in the premises". This enables competing products to be properly marketed in proportion to their importance to the dealer. Advertising for products which the dealer has just begun to sell may not be excluded or unduly impeded.¹⁴⁰

Article 7(2) states: "Beers or other drinks are of different types where they are clearly distinguishable by their composition, appearance or taste".¹⁴¹

(iii) Article 9, application of Article 2(1): restriction on supplier

Article 9 provides that Article 2(1) applies. This latter provision is discussed above and reference thereto may be made for commentary.

(iv) Article 8: Situations where no exemption lies - (including details of time periods)

Article 8 withdraws the exemption in a number of situations.

Article 8(1)(a) and (b), no exemption lies where the dealer is required to take goods or services other than drinks or services directly connected with the supply of drinks. Any action, by whatever means, by the supplier or person connected to or appointed by him, to pressurise the dealer into accepting unrelated goods or services

involves immediate expiry of the exemption. The Commission apparently consider that proof of such pressure would amount to a defense to an action for breach of contract before the national Court.¹⁴²

Article 8(1)(c) and (d), no exemption exists where the agreement is concluded for either an indefinite duration or for a period of more than ten years and the agreement relates only to specified beers and other drinks. Where the agreement relates only to specified beers it may be drafted to last for ten years. These time periods do not affect the parties right to renew their agreement.

Article 8(1)(e), no exemption lies where the dealer is required by the supplier to impose the exclusive purchase tie on his successor in title for a longer period than the dealer would himself have remained tied to the supplier. Thus, restrictions may pass to successors in title but only for the residue of the unexpired time in the original dealers agreement.

Article 8(2) covers the situation whereby the supplier leases the premises to the dealer or allows the dealer to occupy the premises upon some other ground.¹⁴³ Article 8(2)(a) states that the exclusive purchasing obligation and the ban on holding competing products may be imposed for the duration of the period in which the dealer operates in the premises. Thus, Article 8(1)(c) and (d) (noted above) do not apply. However, under Article 8(2)(b) the agreement must provide for the dealer to have the right to obtain: first, non-beer drinks from other undertakings where these offer them on more favourable conditions than the main supplier does; and secondly, non-beer drinks of the "same type" as those specified under the agreement but which bear different trade marks from other suppliers where the supplier does not offer them.¹⁴⁴ The Commission state that Article 8(2)(b) must be construed in good faith by the parties i.e. they must abide by the spirit and intent and not the strict letter of the provision.¹⁴⁵ Whether a third party actually does offer more favourable terms under the first category noted above depends primarily upon a comparison of prices. If a more favourable offer is made to the tenant/dealer the Commission state that, "he must inform the other party of his intentions without delay so that the other party has an opportunity of matching the terms offered by the third undertaking. If the other party refuses to do so or fails to let the tenant have his decision within a short period, the tenant is entitled to purchase the drinks from the other undertaking".¹⁴⁶ The Commission add the important

rider:

"The Commission will ensure that exercise of the right to quote competing prices does not mean that brewers and wholesalers make it significantly harder thereby for other suppliers to have access to the market."¹⁴⁷

The tenant/dealers rights under Article 8(2) override any obligation to purchase minimum quantities imposed under Article 2(3)(b), (see above) to the extent that this is necessary to allow the tenant full exercise of those rights.

(v) Agreements between competing manufacturers

The general rules in Article 3, 4 and 5 concerning competing manufacturers apply, mutatis mutandis, to beer supply agreements. Reference to commentary on those provisions above should therefore be made.

XIV. Exclusive purchasing and petroleum supply agreements: tied petrol filling stations¹⁵⁰

The provisions of Article 10-13 on petrol supply stations follow closely those relating to beer supply agreements. Accordingly the commentary below will concentrate on those provisions which are different.

(i) Basic Provision

Article 10(1) repeats the wording of Article 6(1) quoted in full above. The only difference is that Article 10(1) concerns "certain petroleum-based motor vehicle and other fuels specified in the agreement for resale in a service station" whereas Article 6(1) concerns "certain beers, or certain beer and certain other drinks, specified in the agreement for resale in premises used for the sale and consumption of drinks".

Article 10 can cover either motor vehicle fuels alone e.g. petrol, diesel, LPG or kerosene, or, motor vehicle fuels and other fuels, e.g. heating oil, bottled gas, paraffin etc. However, all the fuels must be petroleum based. The fuels must be for use in motor-powered land or water vehicles or aircraft. The phrase "service station" is to be construed accordingly. It could therefore be a lake side filling station for motor boats or an air strip siting for the refueling of aircraft. The Regulation applies to petrol stations adjoining public roads and fuelling installations on private property not open to public traffic.¹⁵¹

(ii) Article 11(a)-(d) Permissible restrictions on the dealer

Article 11(a) is essentially the same as Article 7(1)(a) on beer and concerns a ban on the dealer supplying competing goods.

Article 11(b) has no counterpart in Article 7. It entitles the supplier to impose an obligation on the dealer, "not to use lubricants or related petroleum-based products¹⁵² within the service station designated in the agreement where the supplier or a connected undertaking has made available to the [dealer], or financed, a lubrication bay or other motor-vehicle lubrication equipment". The provision applies only to lubricants and relates to the servicing and maintenance of motor vehicles. It does not affect the dealers freedom to purchase the products from other undertakings for resale in the service station.¹⁵³

Article 11(c) (on advertising) is exactly the same as Article 7(1)(c), reference to that provision should be made for commentary.

Article 11(d) has no counterpart in Article 7. It permits the dealer to be required to "have equipment owned by the supplier or a connected undertaking serviced by the supplier or an undertaking designated by him".

(iii) Article 13, application of Article 2(1): Restriction on supplier

Article 9 provides that Article 2(1) applies. This latter provision is discussed above and reference thereto may be made for commentary.

(iv) Article 12: Situations where no exemption lies - (including details of time periods)

Article 12 withdraws the exemption in a number of situations.

Article 12(1)(a) and (b) are analogous to Article 8(1)(a) and (b) to which reference may be made. The provisions prohibit the application of the exclusive purchase tie to products other than motor-vehicle and other fuels. This prohibition does not apply to lubricants or related petroleum-based products (Article 11(b) above) or equipment owned or financed by the supplier (Article 11(d) above).

Article 12(1)(c) provides for time periods. It allows exemption only for agreements that are for a period of no more than 10 years. Contracts may be renewed by the parties.

Article 12(1)(d) concerning successors in title is analogous to Article 8(1)(e) and reference thereto may be made.

Article 12(2) concerns exclusive purchasing where the supplier

owns the service station or otherwise allows the dealer to occupy the premises. In such case the agreement lasts until the dealer no longer operates on the premises.¹⁵⁴

(v) Agreements between competing manufacturers

The general rules in Articles 3, 4 and 5 concerning competing manufacturers apply, mutatis mutandis, to motor vehicle fuel supply agreements. Reference to commentary on those provisions above should therefore be made.

(vi) Transitional periods: Time limits for compliance

Motor vehicle fuel agreements must abide by precisely the same time constraints as beer supply agreements (see above).

H. THE NEGOTIATION OF EXCLUSIVE PURCHASING AGREEMENTS
FALLING OUTSIDE THE BLOC- EXEMPTION

Where an agreement is not exempt under Regulation 84/83/EEC it must be notified individually to the Commission. Parties may consider the points below as a means of assessing the likely attitude of the Commission.¹⁵⁵

I. Market Context

Is the market concentrated? The Commission will be more searching in their analysis if the market contains only six major firms with 80% of the total sales between them than if it contains thirty firms none of whom possess more than 2 or 3% of total sales each. The Commission have on occasion employed Article 86 EEC on abuse of a dominant position against major companies:

"An undertaking which is in a dominant position on a market and ties purchases (even if it does so at their request) by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate."¹⁵⁶

The imposition of exclusive purchasing by dominant suppliers will therefore only in the most exceptional case be permissible.

II. Foreclosure

In Soda Ash the Commission commented:

"The Commission has established on numerous occasions that the simultaneous existence of such contracts may foreclose competition in respect of a substantial part of the market for the products in question on the various national markets."¹⁵⁷

Elsewhere the Commission has explained that the criteria for exemption under Article 85(3),

"... are not satisfied if the exclusive arrangements make it more difficult for other firms to sell on the market, and especially if they raise barriers to meet entry. In such a case an application for exemption will usually fail, because the agreements will afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question, and this is in direct conflict with Article 85(3)(b)."¹⁵⁸

Clearly, the extent or "network effect" of exclusive purchase agreements will be influential. The more widespread the clause the more cautious the Commission. As has been explained elsewhere the foreclosure effect will be a central part of Commission analysis

III. Partial or total restraint

Does the clause require dealers to take all, most or merely a small part of his total requirements from the supplier? The higher the percentage of the obligation the greater the extent to which that dealer is foreclosed from rival suppliers who may wish to sell to him.

If the dealer is a very important purchaser, e.g. he accounts for 30% of all market purchases of the relevant product, a clause tying that dealer to a particular supplier will have a significantly anti-competitive effect on the suppliers market.¹⁵⁹

The chance of exemption for a total (100%) requirements clause must be stated to be slim. With requirements of less than 100% the chances of exemption obviously increase as the percentage decreases. There is inadequate case law for indications as to exemptable percentages to be given.

IV. Duration of the agreement

How long is the agreement drafted to last? The longer the duration the greater the length of time the tied up dealer is foreclosed from rival suppliers.¹⁶⁰ The Commission seem to object to exclusive purchase

obligations involving large firms extending for more than a couple of years.¹⁶¹

Longer periods may be justifiable if the supplier accords to the dealer significant commercial and/or financial assistance for example by way of low interest loans, improvement and extension grants etc. It might be reasonable for a supplier who has invested heavily in a dealer to require that dealer to purchase exclusively from him over an extended period as a means of securing a return on his investment. Where such a case occurs the length of time permissible for the tie will depend not only upon the market context but upon the Commission's assessment of what the supplier fairly deserves in view of his financial commitment to the dealer.

V. Whether tie expressed as fixed volume or as a proportion of dealers total requirements

If the clause is expressed simply as a fixed volume e.g. dealer X will purchase 100 tons of widgets from supplier Y then the Commission usually refrain from viewing such agreements as falling within Article 85(1). Obviously any ordinary fixed volume contract excludes rival suppliers to the extent of the purchase. However, that fact alone does not make the agreement anti-competitive.¹⁶² Where a clause, conversely, is expressed as a proportion of the dealers total requirements rival suppliers are foreclosed not from a single contractual opportunity but from a portion of the dealers needs. The Commission have explained it as follows:

"... 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 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."¹⁶³

However, this is not to encourage the immediate redrafting of contracts from percentages to huge fixed volumes. There is little doubt but that if supplier X wishes to agree an exclusive purchase clause with dealer Y and they calculate together that over the next year Y will need 500 tons of widgets and then, instead of obliging Y to take 100% of his requirements from Y, they draft a clause obliging Y to take 500 tons of widgets from X, the Commission will assess this on the basis that its effect is of an exclusive purchase clause.¹⁶⁴

VI. Whether agreement designed to allow market entry or expansion

Agreements between competing manufacturers may permit one of the parties to penetrate a market he would otherwise have been foreclosed from. X situate in France might need to use Y's distributional network as a channel for his own goods in the UK. In Carlsberg,¹⁶⁵ a producer and supplier of lager (Carlsberg) incorporated in Denmark wished to expand sales in response to increased demand in the United Kingdom. Carlsberg entered an agreement with Watney Mann and its parent Grand Metropolitan (GM) which entailed the latter acting as distributor of Carlsberg lager in the UK. Furthermore, they entered a production agreement whereby GM would produce Carlsberg lager under license in the UK for the UK market. Carlsberg has 14% of the UK lager market. The Commission accepted that a foreign supplier seeking penetration of the UK market would require the assistance of a UK brewer.¹⁶⁶ The Commission accordingly granted exemption to last for approximately six years. This would enable Carlsberg to establish and secure production capacity in the UK.¹⁶⁷

VII. The inclusion of "English Clauses"

In the Commission's view so called "English Clauses" are of ambivalent value. Some businessmen and legal advisers consider that such a clause will pacify the Commission and keep from them the antitrust bogey. This is not so. An "English Clause" is a clause entitling a dealer to purchase goods from a rival supplier to the contract supplier where the rival supplier offers them on more favourable terms. The inclusion of a clause drafted along these lines would indeed alleviate many a restrictive agreement.¹⁶⁸ However such clauses are often linked to other obligations, for example, they are linked to a notification clause whereby the dealer must inform the supplier of the rival offer and afford the latter the option of meeting that offer or letting it go to the rival.¹⁶⁹ Alternatively, there are strict conditions imposed on acceptance of the rival offer which make its acceptance all but impossible.¹⁷⁰ Where the supplier is dominant these limitations invariably dissuade the Commission from a sympathetic view towards English Clauses. In principle a notification clause such as that described above enables the contract supplier to monitor his rivals pricing behaviour and enables the contract supplier to regulate the effectiveness of the rivals competitive bidding. Where the supplier is not dominant such clauses are more likely to be suitable for exemption.

VIII. Where both parties are in the same Member State

Where both parties are in the same state there may still be an effect on trade between the Member States such as to trigger the application of Article 85.¹⁷¹ In Castrol¹⁷² the Commission had to investigate the economic effects of a purely national agreement. The Commission required the parties to submit to them the following data:

- a. the number of exclusive purchasing agreements concluded in the Member State concerned classifying the agreements according to their duration as follows: (a) over 15 years; (b) 10-15 years; (c) 5-10 years; and (d) 0-5 years;
- b. the total turnover of the supplier in the relevant products in the previous financial year;
- c. the share of the turnover in the relevant products, in value and percentage terms, which was attributable to business relations with firms obliged to purchase exclusively from the supplier;
- d. the estimated market share of the supplier in the Member State concerned.

The Commission use this sort of information to determine how economically powerful the supplier is; how extensive the exclusive purchasing "network" is; and hence how great the problem of foreclosure is. If a national market is largely tied up with such networks, entry barriers are erected to potential suppliers from abroad. Hence there is an effect on trade between Member States and Article 85(1) applies.

I. EXCLUSIVE PURCHASING IN UK LAW

Exclusive purchasing agreements are subject to control under both the RTPA 1976, as registrable agreements, and under the Competition Act 1980 (CA 1980). These two provisions are mutually exclusive. If the agreement falls within the RTPA 1976 it cannot be reviewed under the Competition Act 1980. If an agreement falls within the exemption for distribution agreements laid down in Schedule 3(2) RTPA 1976 and is hence excluded from that Act then it thus becomes subject to the CA 1980.

I. Under the RTPA 1976

(i) Schedule 3(2): exemption from the Act

Most distribution agreements are exempt under Schedule 3(2) RTPA 1976. This provision is discussed in detail in Chapter 2, Section I. Schedule 3(2) concerns goods agreement only. An equivalent exclusion for services is to be found in Schedule 3(7). The provision excludes from the Act bilateral agreements where neither party is a trade association and where the only restrictions imposed are,

- "(a) by the party supplying the goods, in respect of the supply of goods of the same description to other persons;
- (b) by the party acquiring the goods, in respect of the sale, or acquisition for sale, of other goods of the same description."

Exclusive purchasing agreements concern restrictions above i.e. restrictions on the dealer purchasing goods from anyone other than the contract supplier. A wide range of permutations of purchasing clauses are thus excluded. Many other commonly found restrictions are excluded by Section 9(3) RTPA 1976, see Chapter 1 Section E for details.

It will be noted that exclusion from the Act only exists where the dealer resells the goods.¹⁷³ Where the dealer is restrained from own-production the agreement must be registered. In practice suppliers need not insist on such a clause since the dealer may legally be restrained from selling goods, including his own, other than the contract supplier's.

The phrase "goods of the same description" is taken to imply goods of the same brand and goods of competing brands. (See note on meaning of these words in Chapter 2, Section I)

The word "sale" is used in preference to the alternative word "supply". The latter word includes, according to Section 43(1) RTPA 1976, lease or hire. However, since "sale" is used it cannot be assumed to be identical to "supply". "Sale" thus presumably excludes lease or hire.¹⁷⁴

An agreement involving a trade association is not excluded and must be registered. Such an agreement is deemed to include as parties all the members of the trade association and hence cannot be bi-lateral.

Exclusive purchasing agreements have been given Section 21(2) dispensation in the context of specialisation agreements. In Croda-Manox¹⁷⁵ Croda (C) and Manox (M) were manufacturers of paints and

pastes. C agreed with M that C would stop production of "iron blue powder" and would transfer to M all existing know-how and stocks relating to that product. Under the agreement M stopped production of "Lake red C powder" and, likewise, transferred stock and know-how to C. The agreement also provided that in future M would purchase its entire requirement of Lake red from C and C would purchase its entire requirement of iron-blue from M. These exclusive purchase restrictions were coupled to so called "English clauses". Thus in Clause 2(d) of the transfer agreement of iron-blue from C to M the following clause appears:

"Croda undertakes to purchase its total requirements for iron-blue in the UK from Manox provided that Croda shall be released from this undertaking if Croda can demonstrate to Manox that equivalent material is available in comparable quantities on a continuing basis from a third party source at lower prices and Manox is unable to agree to supply at such lower prices or if Manox is unable for any reason to supply for a period of one month."

The agreement was registrable because it contained restrictions in addition to the purchasing requirements. For Schedule 3(2) to operate the purchasing obligations must be the sole restrictions in the agreement. In this context there were restraints on both C and M manufacturing the products they have transferred stocks and know-how of to the other party. Thus there was a clause requiring either party,

"during the term of this agreement not to manufacture, sell or deal in the UK in [the product] whether as principal or agent and in the event of breach of this undertaking to compensate [other party] for any loss of business up to a maximum compensation payment of £150,000 per annum."

This would be a restriction under Section 6(1)(d) RTPA 1976 on "the quantities ... of goods to be supplied ...". Nonetheless, Section 21(2) dispensation was given following an analysis of the market context of the agreement by the OFT.

(ii) Agreements not exempt

In practice very few exclusive purchasing agreements become registrable. Most are drafted to fit within the exemption. Where they are registrable the attitude of the OFT will be similar to that of the EEC Commission. The principal concern will lie with the degree to which rival suppliers are foreclosed from the contract dealer. The

OFT are concerned that networks of exclusive purchasing agreements may lead to reduced consumer choice as fewer suppliers enter the market and competitive pressures on existing suppliers are hence reduced.¹⁷⁶

The criteria for analysing such contracts may be assumed to be effectively the same as that under the Competition Act 1980.

II. Under the Competition Act 1980

The approach of the MMC and the OFT towards exclusive purchasing and partial requirements clauses has generally been strict. They have demonstrated a marked concern with the problems of foreclosure. Thus in Car Parts¹⁷⁷ in 1982 the MMC in a Report under the FTA 1973 stated:

"One of the likely effects on competition of exclusive buying requirements is that they may lead to a restriction on competition in that, if a supplier imposes exclusivity on any person, other suppliers and potential customers may be prevented from competing for that person's custom and part of the market may thus be closed to them."¹⁷⁸

Exclusive purchasing thus tends to ossify the market structure:

"In so far as components manufacturers are prevented by exclusive buying requirements from competing with one another and with car manufacturers and importers to supply part of the market, there is some limitation of the extent to which the most efficient component manufacturers can expand their business at the expense of the less efficient."¹⁷⁹

There is, in addition, concern that exclusive purchasing may hamper price competition:

"We do not suggest that there is no competitive limit to the prices that can be charged to or by franchised outlets, but we do believe that price competition is not fully effective, and that car manufacturers and importers have a substantial element of discretion in the determination of their prices. Since they are virtually the sole suppliers of replacement parts to their franchisees, we think it inherently likely that their prices are in many cases higher than they would be if there were other suppliers to that sector of the market."¹⁸⁰

Where exclusive purchasing does not however foreclose the potential for rival suppliers to find and appoint suitable dealers then it will be treated more sympathetically.¹⁸¹ The OFT may seek the views of rival suppliers and other relevant third parties for their opinion on the availability of dealers. An important consideration will always be whether a product requires specialist dealers to handle it and how extensive the barriers to entry at the dealers level are. The question is: In the

absence of other existing dealers can the supplier obtain effective representation without undue difficulty by persuading other resellers to commence stocking his goods? The answer will very much depend upon the nature of the product.

Duration of agreement ~~is also~~ relevant: in Petrol¹⁸² the MMC reluctantly accepted that where a supplier undertakes financial investment in a dealer then a longer term exclusive purchasing obligation may be justified than in cases where the supplier makes no investment in the dealer. The MMC stated that agreements in the petrol supply trade should normally be of no more than 5 years duration. In other markets the MMC has considered two years to be a sufficient duration for a tie or requirements clause.¹⁸³

Parties invariably plead improvements in distribution as a positive benefit flowing from exclusive purchasing or partial requirements agreements. The improvements are those described at the commencement of this Section viz., greater security of supply, economies of scale, improvement in dealers provision of services to customers, reduced costs etc. The MMC will examine carefully any alleged benefits and whether they are outweighed by the perceived disadvantages. In general disadvantages appear to weigh most heavily. In one case the MMC stated in critical tone that the "... system neither promoted efficiency in distribution or stimulated competition".¹⁸⁴ They admitted that the system increased the number of dealers but denied that this meant better service for consumers. The increase in dealerships was it transpired not justified by reference to demand, consequently turnover was low and dealers, to compensate, demanded higher profit margins. Consumers hence did not reap any benefits from the over abundance of dealers.

J. COMMERCIAL AGENTS

Commercial agents are considered, by both the OFT and the Commission, to fall outside of competition rules. A commercial agent is a person who for and on behalf of a principal either: (a) introduces a third party to the principal by soliciting orders from the third party; or (b), concludes contracts on behalf of the principal with the third party. Commercial agents are not independent of the principal (the manufacturer or supplier in the present context) but form an extended arm or quasi-employee of the principal. For this reason they are treated as a single economic entity with the principal.

I. EEC law

(i) Commission Notice on Commercial Agents

The Commission has made it clear that relations between principal and commercial or commission agents are not within Article 85(1). In the Notice on Exclusive Dealing Contracts with commercial agents¹⁸⁵ they state: "... the Commission takes the view that the test for prohibition under Article 85(1) is not met by exclusive dealing contracts with commercial agents, since these contracts have neither the object nor the effect of preventing, restricting or distorting competition within the Common Market. The commercial agent only performs an auxiliary function in the market for goods. In that market he acts on the instructions and in the interest of the enterprise on whose behalf he is operating. Unlike the independent trader, he himself is neither a purchaser nor a vendor, but seeks purchasers or vendors in the interest of the other party to the contract, who is the person doing the buying or selling."¹⁸⁶

Commercial agency agreements need not be notified to the Commission. Though, in cases of doubt parties may request a negative clearance. The Commission however will almost certainly seek to settle a case informally without issuing a formal negative clearance. It is clearly important to differentiate a commercial agent from an independent exclusive dealer or purchaser. In the Commission's view the following will be important criteria:

- (a) commercial agents do not conduct business on their own behalf;
- (b) commercial agents do not assume any risk resulting from the transaction. Though, they may accept the usual del credere obligations;¹⁸⁷
- (c) the title given to the representative is immaterial, the Commission make their assessment on the basis of the representatives functions;¹⁸⁸
- (d) commercial agents do not keep and are not required to keep as their own property a considerable stock of the products covered by the contract. Though, a representative who carries a small stock for demonstration or advertising purposes will not, by virtue of that fact alone, become an independent trader;
- (e) commercial agents do not organize, maintain or ensure at their own expense a substantial service to customers free of charge. Thus,

commercial agents who undertake after-sales and guarantee services should be compensated by the principal. If a small amount of such services is provided this will not necessarily affect the agents status, e.g. agent repairs the equipment of a long-standing customer on a one-off basis rather than have it shipped back to the supplier for repairs;

(f) commercial agents do not determine prices or terms of business.

The Commission Notice has no legal force; it is not binding either on the Commission, the European Court or upon any other competent authorities in the Member States. Nonetheless, it is an accurate guide to Commission policy. The European Court have also accepted the reasoning behind the Notice.¹⁸⁹

(ii) Limitations upon the Notice

In certain exceptional cases Article 85(1) might apply to commercial agents.

First, if rival suppliers both appoint the same commercial agent then Article 85(1) will probably apply. A commercial agent cannot be an integral part of both suppliers and, if he is, then there is almost certainly a notifiable agreement between the suppliers.¹⁹⁰

Secondly, if a representative has dual functions both as a commercial agent and as an independent trader then Article 85(1) will apply to the independent part of the representatives activities, it is not yet decided whether Article 85(1) applies to all of the representatives activities. It is probable that the commercial agency activities are still excluded from review. Thus, if X is commercial agent for Y's goods and is also exclusive dealer for Z (whose goods do not compete with Y's) then Article 85(1) should only apply to the agreement between X and Z.¹⁹¹

Thirdly, if the commercial agent is restrained from competing with the supplier after termination or expiration of the agreement Article 85(1) might apply.

II. United Kingdom Law

UK law may be dealt with briefly on this point. In all major respects it seems to follow the EEC line. In British Telecommunications¹⁹² (pricing policy for the placing of advertisements in Yellow pages directories), the OFT investigated under the Competition Act 1980 the practices of British

Telecommunications (BT) concerned with the selling of advertising space in Yellow Pages directories, which they own. In 1981 BT appointed two sales contractors who were to be responsible inter alia for procuring advertising orders in Yellow Pages directories. A question arose as to the legal relationship between the contractors and BT. The OFT stated:

"... the sales contractors can be considered as an extension of BT's own resources for the preparation and publication of YP directories and therefore any competition between them would be a duplication of sales effort. The sales contractors can be distinguished from dealers or distributors who operate in other markets in that they do not buy or sell anything on their own behalf. Thus it is BT, through its sales contractors appointed by competitive tender, that supplies advertising space in YP directors."¹⁹³

There is no reason to suppose that a similar conclusion would not apply under the RTPA 1976. Thus, if X appoints Y as his commercial agent to sell his goods in the North of England, and Z as his commercial agent to sell his goods in the South of England then the agreements between X and Y, and, X and Z would not be registrable.

K. FRANCHISE AGREEMENTS

I. Introduction

Franchise systems are of increasing popularity. They are endemic in the USA where they account for between 25 and 33% of all retail business. At current estimates they account for 350,000 jobs in the UK.¹⁹⁴ In the past such systems have caused few antitrust problems in the UK and the EEC. However, there is voluminous US litigation on point. With their increased usage in the UK and EEC one might reasonably expect an increased exposure to competition in the future.¹⁹⁵

II. Description of a franchise system

A franchise is a contractual system whereby a franchisee (the retailer) is allowed to carry on business under a trade name belonging to the franchisor (the supplier) and under which the franchisor controls and supervises the manner in which the franchisee conducts business. The franchisor provides extensive business guidance services. Nonetheless, the franchisor and the franchisee are legally separate, the franchisee conducts trade as a principal and not as an agent of the franchisor. The result of

the system is a uniformity between different franchisees outlets which lead the public to believe that they are dealing with a single, integrated unit rather than with separate companies.¹⁹⁶

Most franchise networks operate by the franchisor giving the franchisee an exclusive territory in which to sell; by the franchisee accepting purchasing restrictions requiring him to take exclusively from the franchisee whole ranges of products; by the franchisor licensing a trade mark to the franchisee and restricting the latter's use of the mark; by the franchisor requiring the franchisee to accept extensive quality control and market supervision. The franchisee will pay the franchisor various fees for belonging to the system and fees based upon sales revenue.

Franchise systems are hence far more than simply exclusive distribution networks. They are complete systems of business entailing control over product supply, retail organisation and administration, and retail sales.

III. EEC Law

There is scant guidance on Commission policy towards franchising. Apparently they analyse franchise agreements by reference to the effect of the individual clauses rather than taking an overall view. Hence the exclusive dealing and purchasing regulations will be relevant to analysis. Likewise the rules on intellectual property licensing and especially trade marks and know-how must be taken into account (see Chapter 13).

(i) Application of Article 85(1) EEC

Most franchise networks tend to be national in character. However in a number of situations it is predictable that non international franchise agreements will fall within Article 85(1):

(a) Where franchisor and franchisee are in the same Member State.

Although purely national agreements are most likely to fall under national law they may, nonetheless effect trade between the Member States where they create entry barriers to foreign suppliers seeking representation in that domestic market. If the franchisor of a complex luxury product, after much research, appoints a series of franchisees to sell the product then the pool of available retailers may have been reduced significantly. The franchisor may have admitted to his franchise network a high percentage of the best and most efficient retailers leaving less efficient retailers for other suppliers. It is thus clear that the existence of a series of franchise and/or distribution networks covering a certain product can create a barrier to entry to a rival supplier for whom all of the appropriate outlets to the market are foreclosed.¹⁹⁸

- (b) If the franchisor imposes export bans in contracts with franchisees forbidding them to export the goods then trade between Member States has been restricted in that export sales that might have been are prevented.

One question of importance is whether a franchise system could ever be considered a single economic entity so as to negate the element of "agreement" and thereby exclude the application of Article 85. That provision requires at least two parties to agree as a precondition of its application. If a franchisor and a franchisee are very closely connected on a long term basis such that the franchisee is not in practice independent of the franchisor then can franchisor and franchisee be said to be in agreement?¹⁹⁹ The answer is probably yes. The Commission apparently view franchise networks simply as forms of sophisticated distribution system.²⁰⁰ This view is similar to that held in the USA.

(ii) Exemption under Article 85(3)

There is no reason why many franchise networks should not receive exemption under Article 85(3). Indeed some franchise systems may benefit from Regulation 83/83/EEC on bloc-exemption for exclusive distributorship agreements (discussed in Section B of this Chapter). The Commission will almost certainly adopt a similar philosophy towards franchise networks as they have towards ordinary distribution networks. Hence, the necessity of many restrictions as facilitating a more efficient distribution system which will enhance consumer choice and service will be recognised. Thus, in terms of Article 85(3) parties should first assess the compatability of the franchise with Regulation 83/83/EEC. If the franchise is not exempt then it must be notified upon an individual basis to the Commission.

(iii) Analysis of some common types of clause

Most complex franchise systems will have to be individually notified to the Commission. The following is an indication of likely Commission attitude towards certain common clause types. For further details reference should be made to analogous clauses in dealership contracts (above) and in intellectual property licenses (Chapter 13).

- (a) Territorial restrictions: Clauses which directly or indirectly prevent or hinder the ability of the franchisee to sell outside of his territory (e.g. exporting) will almost certainly be unsuitable

for exemption. The text of Article 2 of Regulation 83/83/EEC indicates that a franchisee may be prohibited from actively selling outside of his area but he cannot be prevented from making passive sales. See the commentary on Article 2 above. Franchisors wishing to go beyond the limits of Article 2 should consider whether the "free rider" argument (discussed at Section D, IV above) applies to them. Arguably, the free rider question applies more directly to franchising than to exclusive dealing since in the former the franchisors financial investment in the franchisee may be greater than in the latter i.e. there is a greater degree of investment and franchisor reputation to protect

- (b) Exclusive territories: The grant of an exclusive territory to the franchisee where not attached to export or selling restrictions is almost certainly permissible.
- (c) Tying clauses:²⁰¹ Under Article 2(3)(a) of Regulation 83/83/EEC full line forcing is considered permissible where the products are commercially linked together. However, tying is viewed less sympathetically where the products are uncomplementary or not technically connected.²⁰²
- (d) Prohibition on cross-supplies: Clauses prohibiting the franchisee from supplying other franchisees are rarely acceptable. Prohibitions on "reverse" or "back" deliveries may be permissible. See Section D III(iii) above.
- (e) Prices: Clauses requiring franchisees to abide by specified prices are invariably prohibited. The same applies to inducements applied by the franchisor to encourage resale price maintenance.
- (f) Know-how licenses: The licensing of secret know-how to a franchisee is permissible provided restrictions on use of the know-how do not extend beyond time as the know-how becomes public. Permissible restrictions include obligations of confidentiality and non-use of know-how once agreement has expired. See Chapter 13 for a more detailed analysis.
- (g) Trade-mark licenses: A trade mark license is an integral part of the package, the pure grant of the license is not per se restrictive of competition.²⁰³ Where no trade mark is involved obligations requiring the franchisee to attach the franchisor's mark or name to the products in question are permissible; see for details Chapter 13. The Commissions approach will depend on restrictions associated with the trade mark.

- (h) Compliance with franchisors instruction or operating manual: Clauses requiring the franchisee to comply with the manual should be permissible provided the terms of the manual are acceptable. Acceptable terms include those relating to: Lay out and design of premises, fixtures and fittings (all McDonald's hamburger outlets look similar); training of employees; use of standard forms; standard methods of book keeping; returns of information to the franchisor.
- (i) Advertising and promotion²⁰⁴ control over the franchisees advertising is normal: An obligation on the franchisee to devote a certain percentage of his revenue to local advertising (whilst the franchisor does likewise nationally) is not restrictive. Control over the form of advertising is likewise acceptable though this should not extend to control over advertisements of prices and terms and conditions.
- (j) Royalties: Clauses basing royalties on sales or setting minimum royalties or other performance standards are generally acceptable, even upon pain of termination.
- (k) Non-competition clauses: Clauses preventing the franchisor from competing with the franchisee are common and generally acceptable. Where the prohibition extends beyond termination of the agreement exemption may be available for short term extension (e.g. 12 months).
- (l) Exclusive purchase clauses: See Sections G and H above for details.

IV. UK law

(i) Registrability under the RTPA 1976²⁰⁵

Franchise systems comprise many restrictions imposed on the franchisee by the franchisor. For example: territorial restrictions, price restrictions, method of sale restrictions, premises restrictions. Conversely, the franchisor may accept restrictions. For example: on selling directly in a franchisee's territory; on advertising; on the provision of services. Many of these restrictions will ostensibly be caught by Sections 6 and 11 RTPA 1976. These sections lay down the types of restrictive agreement that must be registered. However, many of these restrictions will also fall under exemptions provided in the Act. In particular four sets of provisions will be relevant in exempting clauses in franchise agreements. These are summarised below for convenience:

- (a) terms relating exclusively to the goods or services supplied
may be disregarded when considering registrability - Sections 9(3)

- (goods) and 18(2) (services) RTPA 1976;²⁰⁶
- (b) restrictions relating to staffing may be disregarded when considering registrability - Sections 9(6) (goods) and 18(6) (services) RTPA 1976;²⁰⁷
 - (c) restrictions on territory and on purchasing may be excluded under Schedule 3(2) (goods) and 3(7) (services) RTPA 1976;²⁰⁸
 - (d) restrictions on the franchisee's use of the franchisor's intellectual property (e.g. patents, registered designs, trade marks, copyright and know-how) may be exempt under Schedule 3 RTPA 1976 and under the general rules on licensing.²⁰⁹

(ii) Important points to note when considering registrability

The RTPA 1976 is of very considerable complexity. When construing a franchise agreement the following points should be borne in mind.

- (a) Consider services and goods restrictions separately. Franchise systems may involve services and goods restrictions. The RTPA 1976 evaluates services and goods restrictions entirely separately. If an agreement contains some goods restraints and some services restraints then the restraints are not added together when trying to determine whether two parties accept restrictions. For example, if the franchisor accepts restraints on the services he supplies and no other restraints and the franchisee accepts restraints on goods and no other restraints then the agreement need not be registered. There will not be two persons accepting goods restrictions nor two persons accepting services restrictions. This might sound anomalous but it has nonetheless been accepted as a quirk of the Act by the Government.²¹⁰
- (b) Establish that two parties accept registrable restrictions. If all of the restrictions are heaped upon the franchisee and none are accepted by the franchisor then there will not be two parties accepting restrictions and the Act does not apply. In deciding whether this is so all restrictions and terms exempted by Sections 9 and 18 may be disregarded. Once those clauses have been ignored any clause exempted under Schedule 3 may be taken out of account. If, following this examination, restrictions are not accepted by two parties then the agreement is not registrable. When examining the contract for any Schedule 3 exempt restrictions it is important to note the proviso in (c) below.

- (c) Schedule 3 exemptions are not cumulative. An agreement can only include restrictions exempt by one section of Schedule 3. The wording of the Schedule 3 exemptions makes it clear that they are only exempt if in isolation from all other registrable restrictions (i.e. not counting Sections 9 and 18 disregardable restrictions). Thus, for example Schedule 3(4) exempts from registration trade mark licenses which impose restrictions on the licensee's use of the mark. The actual provision also contains the following words which are to be found in all of the other exemption provisions "... being an agreement under which no such restrictions as are described in Section 6(1) above are accepted or no such information provisions as are described in Section 7(1) above are made other than ...), restrictions on the use of the trade mark. Note that the words stressed indicate that no other restrictions other than the permitted restriction may be included in the agreement if exemption is to remain.²¹¹ Thus a franchise containing trade mark license restrictions and and restrictions on the franchisor's right to supply other persons in the franchisee's territory would not be exempt albeit that both restrictions, if in isolation, would benefit from various provisions in Schedule 3.²¹²
- (d) Consider Sections 9 and 18 restrictions first. Terms relating exclusively to the goods or services supplied may be "disregarded" under Sections 9 and 18. Thus all restrictions so benefiting should be identified as the first task when considering registrability. Example clauses are given below.

(iii) Clauses exempt: Territorial restrictions

Territorial restrictions are exempt under Schedule 3(2) RTPA 1976.²¹³ However for exemption to apply there must exist no other registrable restrictions in the franchise. In practice few franchises rely upon territorial restrictions alone. Most will be combined with other restrictions. Where the territorial restrictions are linked to restrictions which relate exclusively to the goods or services supplied then these latter restrictions may be exempt under Sections 9(3) and 18(2) RTPA 1976 and the franchise agreement will remain unregistrable.

(iv) Clauses exempt: clauses relating exclusively to the goods or services supplied - Sections 9(3) and 18(2) RTPA 1976

Sections 9(3) and 18(2) allow certain clauses to be disregarded when registration is being considered. The provisions exempt any restrictive "term which relates exclusively" to the goods or services supplied.²¹⁴ The following typical (mainly goods) clauses would appear to be exempt under these provisions:

(a) recommended retail prices -

"In respect of the relevant goods and accessories the franchisor shall procure that the recommended retail prices of all relevant goods and accessories will be such as to enable the franchisee to obtain an X % mark up on the prices invoiced to the franchisee."

This clause relates exclusively to the goods and is hence within Section 9(3). Recommended retail prices are legal under the Resale Prices Act 1976.²¹⁵ In practice franchisees tend to adhere to such prices. Where they have territorial protection from competition from other franchisees of the same brand it rarely matters if they cut prices since such is very unlikely to start a price war with other franchisees. Care should be taken, if the franchise network extends into the EEC, to ensure that the system of recommended prices does not breach Article 85 EEC

(b) Franchisor's sale price to franchisee -

"The franchisor shall ensure that the relevant goods ordered by the franchisee from time to time are invoiced to the franchisee at the lowest prices and on the most favourable terms of the franchisor or other supplier as the case may be applicable from time to time and together with the benefit of the usual trade discount and cash discount."

The price at which the franchisor supplies the franchisee is often the subject of a restriction. Clearly however the restrictive term relates exclusively to the goods supplied and would benefit from Section 9(3).

(c) Stocking requirement -

"the franchisee shall use and maintain in stock at least one sample for display at all times in each of the shops of all the relevant goods shown in the franchisor's current year brochure from time to time issued by the franchisor for distribution to the public or shown on national advertising conducted by the franchisor."

Many franchisors undertake advertising on behalf of all the

franchisees. This is the most logical way to conduct a national advertising campaign. Accordingly, franchisees are required to hold samples of the goods in stock and on display. Such a clause thus relates exclusively to the goods supplied.

(d) ban on hiring out relevant goods -

"the franchisee shall not hire out any of the relevant goods."

Section 9(3) covers restrictions on the way in which goods are sold; thus a ban on the hiring out of goods would be exempt.

(e) retail prices and franchisee obligation -

"the franchisee will use its best endeavours (so far as is permissible by law) to sell the franchise goods at the retail prices recommended by the franchisor."

Best endeavours clauses relating to the retail price of goods would fall within Section 9(3).

(f) Insurance -

"the franchisee will keep the relevant goods and all other articles in the shops insured to their full value against loss or damage by fire and other usual risks except theft with a reputable Insurance Company satisfactory to the franchisor."

Again, the term relates exclusively to the goods supplied and Section 9(3) applies.

(g) Warranties -

"the franchisee will not give any warranty for or on behalf of the franchisor in respect of the relevant goods without the authority in writing of the franchisor."

This term relates exclusively to the way in which the goods will be promoted, thus, the franchisee may not give warranties on behalf of the franchisor. Again, Section 9(3) applies.

(h) Trade mark labels -

"the franchisee may not remove from any relevant goods the Trade Mark X sewn in label or cardboard label affixed thereto."

This restriction relates to the label exhibiting the trade mark i.e. a physical part of the goods themselves. The clause thus relates to the goods and should be disregarded under Section 9(3). Alternatively, the clause may be exempt under Schedule 3(4) (trade mark licenses) as a restriction on the "description of goods bearing the mark" supplied i.e. the franchisor is restrained from supplying the goods without the trade mark.

(i) Restrictions on services provided by franchisor to franchisee -

"The franchisor shall at the franchisor's cost give to the franchisee continuing advice guidance and from time to time visit his principal place of business to analyse the franchisee's operating methods and techniques and advertising and furnish the franchisee with suggestions in writing for improvements thereof if any be required in the franchisor's discretion. The franchisee shall implement any such suggestions within twenty-one days of receipt thereof."

Typically franchisors provide extensive business guidance services to the franchisee. Terms which relate exclusively to these services should be exempt under Section 18(2). The above clause restricts the franchisees absolute discretion as to business conduct but apparently relates exclusively to the service provided by the franchisor.²¹⁶

(j) Tying clauses -

"The franchisee agrees to use its best endeavours at all times throughout the currency of this agreement to maintain a stock of the whole range of the specified products available from time to time of a sufficient size in each such product to fulfil the normal and foreseeable requirements of the franchisee's business."

A tying clause which requires the franchisee to accept a range of products produced or supplied by the franchisor is a term which relates exclusively to the goods supplied and hence should benefit from Section 9(3).

(v) Clauses exempt: staffing restrictions

Sections 9(6) and 18(6) REPA 1976 allow to be disregarded when determining registrability restrictions, "... which affects or otherwise relates to the workers to be employed or not employed by any person, or as to the remuneration, conditions of employment, hours of work or working conditions of such workers."

Franchisors not infrequently require the franchisee to employ staff who are specialised and/or experienced in the handling and presentation of the franchisors' types of goods. Such restrictions may be ignored when deciding upon registrability.

A very restrictive light, however, has been cast upon this provision by the RPC in Association of British Travel Agents²¹⁷ where the Court held that staffing restrictions imposed by ABTA on members

although technically falling within Section 18(6) were not exempt by that provision. The restrictions in question demanded, inter alia, that point of sale staff have at least 3 years experience in the trade of travel agent, and, that members employ at least 2 full time staff to deal with the issue and arrangement of tickets. The Court stated that in isolation the staffing restrictions were covered by the strict wording of Section 18(6). However, they stated that where the restrictions were members of a family of restrictions which, when viewed conjunctively, were against the public interest it would be "unthinkable"²¹⁸ to assume that "Parliament intended the Court to leave intact a restriction which appears, in the light of that evidence, to be harmful to the public interest ..."²¹⁹ The Court thus refused to decide the issue by reference to the strict letter of Sections 9(6) and 18(6) preferring rather to decide by reference to the overall effect of the restrictions. Such an approach may be questioned when the precise language of Sections 9(6) and 18(6) are considered; it certainly does not ease the task of those seeking to predict the legality of staffing restrictions.

It is strongly suggested that where the staffing restrictions are imposed by the franchisor in order to protect the reputation of the product or service in question there should be few problems and Sections 9(6) and 18(6) exemption should be assumed.

(vi) Clauses exempt: Intellectual property licenses

Often the basis of a franchise will be in the license by the franchisor to the franchisee of a patent or a trade mark. As has been stated before the OFT adopt the view that the licensing of patents, trade-marks, copyright etc. do not amount to restrictions within the RTPA 1976. It is considered that a licensee of such a right rather than being restricted actually gains rights since, prior to the license, the licensee had no rights at all to use the patent, trade-mark or copyright.²²⁰ Hence the OFT view limitations upon the use of intellectual property sympathetically and tend not to treat them as restrictions. See Chapter 2 Sections J, K and L for details.

(vii) OFT attitude: Dispensation under Section 21(2)

The OFT rarely experience problems with franchise agreements. They generally adopt a pragmatic view of franchise systems accepting that the system is a package and that the franchisor will need to closely control the franchisee if a relatively uniform network of franchisees covering

a wide geographical area is to be sustained.²²¹ Many restrictions may benefit from exemption under the provisions mentioned above. However, it should be added that views vary concerning the application of these provisions and there is scant judicial guidance on points to assist those concerned with questions of registrability. It is some comfort therefore that should parties decide to register their agreements (probably on the fail-safe basis) the OFT are likely to grant Section 21(2) dispensation.

Naturally the OFT do not give carte blanche to franchise networks and much will depend on the market context. If the franchisor has significant economic power and is subject to little inter-brand competition then the OFT may require alterations to the agreements to be made before Section 21(2) dispensation is given. The OFT in such cases may be concerned that an economically powerful franchisor has tied up in his network many of the most effective franchisees foreclosing them as retail outlets to other potential suppliers of rival brands. Where this is a possibility the OFT may require amendment of clauses in franchise agreements requiring the franchisee to take all of his requirements from the franchisor. Thus in Boosey & Hawkes PLC Franchise Agreements²²² the OFT persuaded Boosey & Hawkes PLC who produce, import and distribute musical instruments to delete from franchise agreements with retailers a clause which was designed to prevent franchisees from obtaining foreign manufactured musical instruments which were similar to those imported and distributed by Boosey & Hawkes from any source other than that Company.

(viii) Avoiding registration

Below is a brief summary of the points to be borne in mind when drafting a franchise agreement that is non-registrable:

- (a) The agreement may contain as many restrictions described in Sections 9 and/or 18 RTPA 1976 as is desired. These restrictions are to be disregarded when registration is being considered.
- (b) An agreement in which the franchisee accepts restrictions but the franchisor does not is not registrable. A problem clause here is one prohibiting the franchisor from selling direct in the franchisee's territory. Such clauses are prima facie exempt under Schedule 3(2) RTPA 1976. However if the clause exists with any other registrable goods restriction it is not exempt (Schedule 3 restrictions are only exempt if they sit in isolation

from other registrable restrictions) and will be caught by Section 6(1)(f) (goods) as a restriction on the persons or classes of person to whom goods are to be supplied. It may also be a restraint on the places in which goods may be supplied under the same provision (See Section 11(2)(e) for the services equivalent). The inclusion of this clause with registrable restrictions on the franchisee means that two parties accept restrictions.

- (c) Only one Schedule 3 exempt restriction should be included. It has already been noted that the Schedule 3 exempt clauses must exist in isolation. However, as a matter of practice the OFT treat restrictions on intellectual property rights as not restrictive (see Chapter 2, Sections K and L). Thus parties may in the same agreement have exclusivity restraints exempt by Schedule 3(2) and trade mark license restrictions exempt under general law i.e. parties need not rely on the Schedule 3 exemptions for intellectual property licenses.
- (d) Restrictions on goods and services are to be treated separately. Thus, the franchisor might accept restrictions on the services he supplies to the franchisee, and, the franchisee might accept goods restrictions. Although both parties accept restrictions the agreement is non-registrable. There are not two parties accepting goods restrictions or two parties accepting services restrictions.

(ix) Competition Act 1980

Agreements exempt from the RTPA 1976 are subject to the CA 1980. Though, it is unlikely that the OFT will concentrate its efforts under this procedure. When franchise related problems have emerged in MMC investigations the MMC have recognised that a franchise system requires restrictive clauses to bind it together and that, for example, tying clauses are part and parcel of the system.²²³ Nonetheless, should problems arise it is predictable that they will arise in connection with: tying; abuse of trade mark licenses; exclusive purchase and supply obligations.²²⁴ The attitude of the OFT will depend largely upon the degree of economic power wielded by the franchisor.

(x) Note on Franchisee Clubs

In many franchise systems the franchisor organises a franchise club thereby linking all franchisees together. These "clubs" can very easily turn into registrable agreements. For example in

Pronuptia and Young (franchises) Ltd. Agreement²²⁵ a clause in the franchise agreement stated:

"In the event of agreement by a majority of the Franchisor's franchisees within an area served by a regional advertising media that a regional advertising and publicity programme designed to promote the image and name of pronuptia should be undertaken and further agreeing to the media to be employed and the amount to be expended by the Franchisee specifically agrees to abide by the majority decision of any such agreement ANY decision so made shall be subject to the consent of the Franchisor and the franchisee will comply with all directions made by the Franchisor in respect of such advertising and will contribute to the cost thereof in such proportions as the Franchisor's advertising Agents shall consider fair and reasonable."

Where the franchisees are providing services then an agreement as to advertising might well be registrable under Section 11(2)(d) i.e. an agreement concerning the form and manner in which designated services are to be obtained. Though, the Pronuptia case above concerned goods and agreements concerning advertising of goods are not registrable. There is no equivalent in Section 6 RPA 1976 to Section 11(2)(d) (see Chapter 11 Section J for details). Where a franchisee club agrees on advertising policy but (as in Pronuptia above) advertising restrictions are imposed on franchisees solely in the context of the contract with the franchisee then the restriction may be exempted under Section 18(2) RPA 1976 as a term relating exclusively to the service provided.

Franchisee clubs should not be used as cloaks to hide attempts by franchisees to maintain and enforce standardised resale prices.

L. SELECTIVE DISTRIBUTION²²⁶

I. Introduction

Many manufacturers, especially of luxury or technical goods, desire to regulate the retail outlets through which their goods are sold. Usually, manufacturers employ technical criteria - capacity to provide customer services, adequacy of facilities, staff with appropriate technical expertise and experience etc. - as their means of selecting dealers. Prima facie there is no problem under competition law since a dealer has no right per se to be supplied by a particular supplier. Competition law intervenes, however, where such criteria are employed in a restrictive fashion. In general two questions of misuse of selection criteria arise:

- (i) Manufacturers exclude qualified dealers from their networks in order to maintain high prices or exclude modern marketing methods;
- (ii) Manufacturers terminate the dealership or franchise of an existing dealer or franchisee on the grounds that they were suspected of price-cutting or of exporting or importing the goods so as to take advantage

of price differentials between different areas.

The European Commission, the OFT and the MMC have examined many cases on this issue. Complaints from dealers either refused admission to a Manufacturers network or expelled from such a network are common.

II. EEC law

Criteria for dealer selection can be both qualitative and quantitative. Qualitative criteria include minimum requirements as to trained personnel, stocking, provision of after-sales services etc. Quantitative criteria operate to limit the number of outlets in a given area by making use of such criteria as population and presumed income estimates. In cases on selective distribution the Commission now state that,

"... selective distribution systems constitute an aspect of competition which accords with Article 85(1), provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion (so-called 'qualitative selective distribution system'). With regard to the qualitative criteria, the Court [has] stated that it [is] necessary to consider whether the characteristics of the product in question necessitated a selective distribution system in order to preserve its quality and ensure its proper use and whether those objectives were not already satisfied by national rules governing admission to the resale trade or the conditions of sale of the product. Finally inquiry should be made as to whether the criteria laid down did not exceed the requirements of a selective distribution system based on qualitative requirements."²²⁷

In general criteria of an objective qualitative nature fall outside of Article 85(1); criteria of a quantitative nature usually fall within Article 85(1) but may obtain exemption under Article 85(3).

(i) Selective Distribution not within Article 85(1)

According to Commission statements (above) the following are characteristics of a system outside Article 85(1):

- (a) criteria are objective;
- (b) criteria are of a qualitative nature;
- (c) qualitative criteria pertain to technical qualifications and/or the suitability of trading premises;
- (d) the criteria are applied uniformly and without discrimination to all applicant dealers.

A manufacturer may set the criteria at a very high standard and still avoid Article 85(1) provided the conditions above are met. Though a supplier with a dominant position who restricts outlets so as to restrain output thereby maintaining high demand which in turn sustains supra-competitive prices might breach Article 86 EEC on abuse of a dominant position.²²⁸

Examples of cases involving clauses held to be outside the scope of Article 85 are given below.

In BMW²²⁹ the Commission granted negative clearance to clauses whereby BMW controlled the nature of the distributors advertising policy and use of BMW trademark. BMW also controlled the participation by distributors in trade shows where such would compromise the success of BMW at the show.

In Junghans²³⁰ the Commission granted negative clearance to an obligation on exclusive dealers in Belgium and Denmark to inform Junghans of all questions relating to the sale by them even though this enabled Junghans to find out about the activities of other Junghans dealers.

In IBM Personal Computer²³¹ the criteria for appointment of an authorised dealer were: (a) that dealers had sales staff experienced in the use of micro-computers or prepared to be trained in their use; (b) that dealers had appropriate demonstration and advertising display space and were willing to maintain display space for demonstration purposes; (c) that dealers had the ability to provide technical and training support to customers; (d) that dealers had facilities and staff able to service IBM personal computers; (e) that dealers had the ability to run a micro-computer sales business; (f) that dealers had a favourable banker's reference and credit rating; (g) that prospective dealers had no contractual obligations preventing him from becoming a dealer; (h) that dealers accepted IBM terms and conditions; (i) that dealers complied with the law and the IBM code of professional conduct which forbids dealers misrepresenting the nature of IBM's products or disparaging the abilities of competitors products.²³² The Commission commented: "It is reasonable that a manufacturer should insist that its dealers are able to give such information or advice about the manufacturer's computers. In addition, most users will wish to try out different systems before purchasing, and rely on the availability of expert post-sales advice and repair and maintenance service. There

are no national rules governing admission to or conditions of sale in the trade. Computer products such as the IBM personal computers do, therefore, at present justify a selective distribution system".²³³

Moreover, the Commission declared that certain clauses included in supplier/dealer contracts fell outside of Article 85(1). The most important of these were: (a) dealers must submit their advertisements (though not any price or conditions adverts) to IBM for approval; (b) dealers must maintain records of customer names and addresses, serial numbers of purchases and dates of delivery for the purpose of repairs under warranty and make the records available to IBM in the event of any necessary safety changes; (c) dealers must, within the warranty period, provide services for any IBM machine irrespective of the place of sale or identity of seller.²³⁴ It is noteworthy that IBM made no attempt to control retail prices nor did it impose restrictions on dealers holding rival brands.

(ii) General conditions to be met if Article 85(1) is to be avoided

Four general conditions must be met if a system is to avoid Article 85.

First, the product must be of a type appropriate to selective distribution. Products of a complex, technical nature are suited to selective distribution e.g. stereos, computers, watches. Also products which rely on: brand name and image (e.g. perfume); expert pre and post-sales service; and to a lesser degree, rapid turnover because they have a short shelf-life.²³⁵ Certain products are considered unsuited to selective distribution: e.g. plumbing fitting;²³⁶ cutlery;²³⁷ and, tobacco products.²³⁸ There is a hint in IBM Personal Computers²³⁹ that the Commission may become less sympathetic to the selective distribution of technologically complex products as such products become more familiar to the general public and the need for expert sales assistance less acute. The Commission, in that decision, noted that personal computers required specialist dealer handling and that: "This conclusion is based on the present situation in this market in which new highly technical products are being sold mainly to inexperienced users who have not enjoyed the education that is now being offered in many schools and colleges."²⁴⁰ The necessity for selective distribution is thus a function of the skill and knowledge of the purchaser.²⁴¹

Secondly, the qualitative obligations must not exceed what is essential to meet the legitimate needs of the system as a whole. Thus

in Ideal-Standard²⁴² the Commission complained that a clause whereby the Supplier would only supply trained plumbers with plumbing fittings for resale was excessive. Advice and guidance could be given by specially trained sales staff; there was nothing to prevent non-specialist outlets hiring or training suitable staff. The Commission condemned the system on other grounds also viz., plumbing fitting were unsuited to selective distribution. In Junghans²⁴³ the Commission complained that it was unnecessary to require that dealers be trained clock and watch specialists since specialist staff could be hired in non-specialist outlets which rendered them qualified to act as dealers.

Thirdly, selective criteria must not be discriminatory or arbitrary. Thus discount and department stores must be supplied where they meet the relevant criteria.²⁴⁴

Fourthly, the system must contain no contractual clauses caught by Article 85(1) else the contracts will be notifiable and exemption under Article 85(3) or a comfort letter will have to be sought.

It follows from the above that some, objective qualitative criteria may yet fall within Article 85(1). Indeed, it is easy to imagine criteria which were composed strategically to ensure that certain types of retailer (who might be perfectly well qualified to deal in the product) were excluded. One commentator has commented pertinently: "However, the Commission has faced a severe problem in trying to distinguish simple, objective and non-discriminatory qualitative criteria from other qualitative criteria; all criteria must have discriminatory effects and deciding what is simple and objective is essentially arbitrary."²⁴⁵ The point being that adoption of qualitative criteria does not guarantee avoidance of Article 85(1).

(iii) Agreements falling within Article 85(1) seeking exemption under Article 85(3)

Agreements not falling outside of Article 85(1) may obtain exemption under Article 85(3). Quantitative restrictions will fall under Article 85(1). These are restrictions seeking to impose numerical limits on the number of appointed dealers. Generally such attempts are denied Article 85(3) exemption, however in certain cases exemption has been granted. The Commission usually complain that limits on the number of qualified dealers harms consumer choice and thus disqualifies

the agreement from exemption under Article 85(3) since consumers will not enjoy a fair share of the benefits of the distribution system.²⁴⁶

However, the Commission has on occasion exempted under Article 85(3) quantitative restrictions.

In BMW²⁴⁷ the manufacturer imposed qualitative and quantitative restrictions. The quantitative selection of dealers meant that some qualified dealers were refused supplies on the basis that an increase in dealer numbers would, so BMW asserted, harm their marketing. The Commission accepted BMW's claims. Selection of a limited number of dealers was acceptable because it enabled BMW to set up the most rational distribution methods for satisfying consumer demand. BMW persuaded the Commission that the contractual limitations on selection enabled the company to continue its close co-operation with dealers in enhancing the interests of road safety, in providing a minimum uniform manufacturers guarantee and in the advancement of new methods of reducing environmental pollution.

In Omega²⁴⁸ the manufacturers distributed their watches via head-agents in each country. These agents selected dealers to perform the retail function. Dealers were selected upon qualitative and quantitative grounds. The Quantitative limitations sought to limit the number of dealers authorised in each region or town to an optimum number decided upon by the head-agent on the basis of the size of the local population and its presumed purchasing power. The system was within the terms of Article 85(1) ; qualified dealers were excluded from the system on the grounds that they were superfluous to the needs of a territory. If all qualified dealers had been admitted to the system average dealer turnover would have been greatly reduced leading to reduced stockholdings and promotion efforts by dealers. Consumers would have suffered from reduced choice, diminished pre and post-sales services and even higher prices since the manufacturers increased distribution costs would have had to be assimilated into price. Retailers would most likely have sought higher profit margins as well to cover their reduced turnover.

The most common argument raised in support of quantitative restrictions is the free-rider argument. This has been discussed elsewhere in this chapter. Essentially, where a retailer is required to undertake expensive stocking, display and promotion services in connection with the sale of a product there is need of protection from sellers of the same brand of product who can, parasitically, "free-ride" on the promotional activities of the authorised dealers. Customers may

exploit display and pre-sales services offered by an authorised dealer but purchase from a cheaper non-authorised seller around the corner. If this trend continues authorised dealers may be forced to discard stocking, display and pre-sales services etc. in order to reduce price and be competitive. In turn, the products will not receive the expert treatment they require and which is necessary to protect the manufacturer's reputation. Quantitative limits on dealer numbers protect dealers because the customers ability to shop around is limited by the distance between dealers. This "free-ride" argument is easier to justify where technically complex products are in question since they, by their nature, require specialist care. Nonetheless in the Perfume cases manufacturers sought to justify (unsuccessfully) quantitative limitations on the need to guarantee the earning of authorised dealers who were required to advertise and provide advisory services to customers.²⁴⁹

A further argument in favour of quantitative limits is that they facilitate rational distribution and keep prices down. If manufacturers must supply advertising literature and supervise an unnecessarily large group of dealers, costs would increase which might have to be passed on; retailers, whose turnovers were proportionally smaller as new dealers were admitted, might seek increased margins to compensate.

However, it should be clearly understood that these arguments find favour with the Commission in but exceptional cases. This is not to say that they should not be pleaded only that very strong supporting evidence must be furnished.²⁵⁰

(iv) Other restrictions, possibility of exemption²⁵¹

(a) Territorial restraints: Where the supplier appoints only one dealer in an area no breach of Article 85 has occurred. However, dealers often seek a degree of exclusivity. Where the supplier seeks to grant an exclusive territory note should be taken of Regulation 83/83/EEC on bloc-exemption for exclusive dealing (discussed earlier in the chapter). Moreover, Commission policy on the permissible extent of territorial protection must be noted. Dealers may not be restricted from supplying unsolicited orders deriving from outside of their territories; export bans may not be imposed (and may attract fines if imposed). Dealers may be restricted from making active sales efforts outside of their areas e.g. by setting up warehousing facilities or undertaking advertising. For further

details see Section B of this chapter.

- (b) Dealers Price margins: The Commission will not generally tolerate attempts by suppliers to set and enforce retail prices.²⁵² Price rigidity is often inherent in these systems without supplier interference. This has been recognised by both Commission and European Court. In AEG-Telefunken²⁵³ the Court noted that price rigidity was due to the fact that prices charged in specialist outlets tended to stay within a narrow margin than they would have done had there been competition from non-specialist dealers. Further, they accepted that this price rigidity was counter-balanced by competition in the quality of services afforded customers. However, they added that the setting of minimum profit margins was unjustified where the effect was to exclude cheaper yet still specialist departments in new types of retail establishment who could provide equally extensive services in respect of goods. AEG Telefunken were fined for only appointing dealers who agreed to charge certain prices, for seeking to protect appointed dealers from further competition and for seeking directly and indirectly to dictate resale prices to dealers. It would seem from this judgment that price restrictions if at all legal will not be so where they are imposed and enforced so as to artificially sustain price levels and exclude new forms of marketing methods.²⁵⁴
- (c) Customer restrictions: The Commission has examined customer restrictions in a number of cases. These are worth noting. In BMW²⁵⁵ a clause whereby BMW agreed not to sell direct or through its subsidiaries to the final customer (with a few limited exceptions) was caught by Article 85(1) but exempted under Article 85(3). The clause prevented customers purchasing direct from the manufacturer but enabled BMW dealers to retain incentives to provide adequate services and thus compete effectively with other brands. In SABA a clause prevented German wholesalers from competing with retailers for sales outside the scope of Article 85(1). Allowing wholesalers to sell to customers was incompatible with their position in the distribution chain, it would give them an unfair advantage over dealers. The restriction was thus perfectly valid.²⁵⁶ Customer restrictions imposed on wholesalers are probably valid where they relate to products which the wholesaler cannot prove is purchased in bulk by that class of customer.

- (d) Turnover restrictions: Manufacturers may wish dealers to achieve "adequate" turnover figures which take account of possible growth in a market. These restrictions can have the same effect as quantitative selection since they limit dealerships to those with capacity to meet high demand.²⁵⁷
- (e) Exclusive purchasing: Restrictions of this nature are discussed in earlier sections of this Chapter.

(v) Selective Distribution and motor vehicles

In December 1984 the Commission issued a special Regulation providing bloc-exemption to certain selective distribution criteria for motor vehicle distribution and servicing agreements.²⁵⁸ For those requiring a detailed analysis of the language of this bloc-exemption the Commission have published explanatory notes.²⁵⁹ The bloc-exemption recognises the need for specialist distribution particularly because vehicles are consumer durables that require expert maintenance and repair at periodic intervals. Moreover, the Commission recognise that close co-operation between manufacturers (or their importers) and a number of selected dealers and repairers guarantee the provision of specialised servicing for the product. Finally, the Commission have recognised that inter-brand competition may well be more relevant than intra-brand competition and that restrictions on competition between dealers and repairers may be tolerated.²⁶⁰

A brief summary of the main provisions of the Regulation appear below:

- (a) Permissible restraints on the motor dealer:
 - not to sell new vehicles of another manufacturer nor parts which do not match the quality of those supplied by the manufacturers to whom he is linked;
 - not actively to seek customers outside his allotted territory. This means that dealers may meet unsolicited orders from outside of their territory;
 - not to sub-contract distribution or servicing and repairs to other dealers or repairers without the permission of the manufacturer (or his importer);
 - not to sell new vehicles or replacement parts obtained from the manufacturer to dealers outside the distribution network.

(b) Manufacturer restraint:

- manufacturers may restrict their freedom to appoint other dealers or to supply end-users direct in the allotted territory.

(c) Restrictions imposed by the Regulation designed to protect competition and unrestricted freedom of consumers to purchase new cars wherever price and conditions are most favourable:

- consumers must be able to obtain servicing and repairs under the manufacturers guarantee performed anywhere in the EEC;
- dealers must not become over-dependent on manufacturers. Agreements must have at least a four year currency and must specify at least one year's notice for termination;
- consumers must be able to purchase new cars with the specifications they require at the place where they are to be registered from official dealers in other Member States who are willing to supply, if the manufacturer (or his importer) sells the model concerned via the official distribution network at both places. This prevents manufacturers and their importers from preventing or hindering the sales of right hand drive cars on the continent.

Breach of any of the above three situations may result in withdrawal of the bloc-exemption.

As regards the often acute price differentials existing between car prices in the Member States this is assumed to be a reflection of the particular play of market forces about which the Commission do not intend to take particular action. However, the Commission have commented that very high differentials may be a sign of governmental or private restrictive measures. In extreme cases price differentials may lead the Commission to withdraw the bloc-exemption. Moreover, the Commission have stated: "where European consumers wishing to buy a vehicle with the specifications of their own country in another Member State are confronted with supplementary charges which are not objectively justified, bringing the price of the vehicle above that which would result in normal competitive circumstances, a Commission proceeding to withdraw the exemption may follow."²⁶¹

The bloc-exemption applies retroactively to automobile dealership agreements existing prior to 1 July 1985 (date of coming into force of Regulation) which either comply with its terms or are amended so to do. With respect to old agreements duly notified to the Commission the

undertakings have until 1 October 1985 to comply and until 1 December 1985 to communicate the changes to the Commission.

III. United Kingdom law

(i) Selective Distribution and the Competition Act 1980

Selective distribution will not involve the RTPA 1976. Invariably OFT involvement is triggered by the complaint of a dealer who has either been refused supplies or whose dealership has been terminated by a supplier. In such cases the OFT treat the case as a possible anti-competitive practice by the manufacturer. The MMC in monopoly investigations has faced the problem on a number of occasions also. Both the OFT and MMC recognise the need for selective distribution and the need to confine supplies to specialist retailers. Thus the MMC have accepted for example that infant foods may be limited to chemists who have the expertise to proffer adequate advice to customers.²⁶²

(ii) Qualitative criteria

The first proper investigation under the CA 1980, Raleigh,²⁶³ concerned selective distribution. The OFT and MMC analysis has however received biting criticism.²⁶⁴ Raleigh are bicycle manufacturers. Since 1972 when their market share was 67% they had declined to a 40% market share in 1980 due to intensified domestic and imported competition. The conduct complained of was Raleigh's refusal to supply multiple retail stores since they preferred to supply only to specialist dealers who could provide specialist facilities for pre-sales inspection, advice, and spare parts. The OFT considered that the strength of Raleigh's brand image was of "critical importance" to the analysis. The enviable brand image of Raleigh meant that competition would be distorted if the multiples were refused supplies. The OFT concluded that the refusal to supply was anti-competitive and referred the case to the MMC.²⁶⁵ This body considered the public interest arguments, they rejected Raleigh's proposition that public safety was improved by the nature of the appointed dealer. Conversely, the MMC accepted Raleigh's selection criteria based upon pre-sales services, display capacity, expertise of staff, stockholding etc. i.e. ordinary qualitative criteria.²⁶⁶ However they added that dealers refused supplies should be given a reason for the refusal and that supplies should be made when the dealer

satisfied the criteria. The MMC concluded by recommending that,

"Raleigh should widen its distribution policy by selling to discount stores in certain circumstances. If Raleigh were to sell through discount stores which observed the same standards of pre-sale inspection and other technical service requirements as do comparable outlets (for example some department stores) already supplied by Raleigh, and if Raleigh were to supply bicycles to such discount stores under brand names other than Raleigh... we believe that any risk of damage to Raleigh's reputation and brand image would be substantially eliminated."²⁶⁷

The value of Raleigh as a guide to OFT policy must be cautiously stated. This was the first investigation, it has been criticised for the OFT and MMC overstating the economic importance of Raleigh's market power.²⁶⁸ Nonetheless, it shows that strong brand owners must be careful about refusing to supply multiples who can provide adequate back up services. It further suggests that the OFT, like the Commission,²⁶⁹ are concerned to ensure that new forms and methods of marketing are not hindered by brand owners refusing to supply.

In Sandersons²⁷⁰ the OFT accepted with few qualms a complex set of criteria based upon: creditworthiness, staff expertise, advertising capacity, stockholding, and, minimum purchase ability. There was coupled to these qualitative criteria an element of quantitative criteria (see below) which also passed muster.

(iii) Quantitative criteria

In Sandersons²⁷¹ the OFT adopted a pragmatic view towards quantitative criteria based on the number of outlets in an area. They declined to declare quantitative criteria inherently anti-competitive. In that case the degree of competition from other brands was important. The stronger the level of inter-brand competition the less likely it was that anti-competitive effects would derive from the supplier regulating the number of outlets in an area:

"... It is necessary to look at the application by Sanderson of the geographical factors of its general assessment criterion - the number of other outlets in the area, the need for further outlets in the area to satisfy consumer demand, the suitability of the proposed outlet in relation to existing outlets, and the position and type of proposed outlet From the point of view of competition, refusal to supply on geographical grounds raises difficult issues. Some degree of geographical selectivity may be desirable from the suppliers' point of view in order to reinforce the products brand image or when the costs of distribution to an unlimited number of outlets would be excessive. Selective distribution may, however, have anti-competitive effects, for example if the product is a dominant brand and the selected retailers are granted a territorial monopoly."²⁷²

Thus, the OFT accept that quantitative limitations may be justified at least in two situations: (a) to protect the suppliers brand name; (b) to ensure that the cost of servicing an outlet remains economical. With regard to the latter point Sandersons, as a rule, only supplied outlets who could purchase a minimum of £2,500 worth of goods per annum. This sum was considered the threshold below which the costs of supply were excessive in proportion to return.

M. DEALERS REFUSED SUPPLIES: COMPLAINTS AND REMEDIES²⁷³

I. Legal and economic context

In this section attention focuses upon the position of a dealer who has either been refused supplies by a supplier or who has had his existing dealership terminated by a supplier. "Refusal to deal" cases are generally considered in terms of the economic power of the supplier. If supply X with 15% of the market refuses to supply dealer Y then almost certainly no infringement has occurred. Y can go elsewhere for supplies or to other brands. X's refusal should not affect Y's economic health. However, if X enjoys 90% of the relevant market a refusal to supply Y could force Y out of business since the chances of Y obtaining alternative supplies are remote.

Refusal to supply therefore is thus usually perceived as a monopoly power problem. Accordingly, the following courses of action are available to excluded dealers:

- (i) Complain to the OFT under the CA 1980 alleging that the supplier has acted anti-competitively.
- (ii) Commence action for an injunction and/or damages for breach of Article 86 EEC before the national court if it considered that the supplier enjoys a dominant position.²⁷⁴
- (iii) Commence an action for an injunction and/or damages for breach of Article 85 EEC before the national court if it is considered that the refusal to supply is the result of a restrictive agreement between the supplier and other authorised dealers.
- (iv) Complain to the Commission alleging infringements of Article 85 and 86 EEC on the basis of (ii) and (iii) supra.
- (v) Commence an action for breach of statutory duty under Section 25(3) Resale Prices Act 1976 alleging breach of Sections 11 and 12 of that Act. Under these provisions damages may be awarded against a supplier who unlawfully withholds supplies from a dealer who fails to comply with the suppliers price stipulations.

II. Typical situations of Refusal to Supply

Certain situations occur with seeming regularity. Some examples are briefly noted below:

(i) Dealer refuses to purchase exclusively from supplier.

Suppliers may wish dealers to accept exclusive purchase obligations banning them from holding brands other than the suppliers. Where the supplier has economic power exclusive purchasing can operate to exclude rival suppliers from the market since the best dealers will be contractually precluded from holding their goods. In such situations the dealer who wishes to hold rival brands may be refused supplies by the dominant supplier. Thus for example, in Kango Wolf Power Tools²⁷⁵ the OFT received complaints from dealers of Kango "Task Force" power tools (in particular Electro-pneumatic hammers) who indicated that the manufacturer was refusing supplies to dealers who refused to accept no dualling restrictions i.e. restrictions on holding rival brands. the OFT encouraged Kango Wolf to change its policy so as to permit dualling. In consequence of this agreed solution the OFT did not proceed with formal proceedings under the CA 1980.

(ii) Dealer refused supplies and/or dealership terminated because of refusal to maintain resale prices.

Attempts by suppliers to enforce resale price maintenance are invariably illegal. Price cutting often comes to the suppliers notice through complaints from other dealers. Where dealers and supplier agree to enforce resale prices then an agreement subject to control will have evolved. A dealer denied supplies in this manner may complain to the authorities of the suppliers behaviour per se and of the dealers and suppliers behaviour collectively. The former collective behaviour may be illegal under Article 86 EEC or Section 11 Resale Prices Act which renders it illegal for a supplier to withhold supplies from a dealer as a means of enforcing resale price control.²⁷⁶ The latter behaviour may be contrary to Article 85(1) EEC; a registrable agreement under Section 6 RTPA 1976 (with Section 21(2) dispensation almost certainly unattainable);²⁷⁷ and, unlawful under Section 2 Resale Prices Act 1976 as a concerted attempt to enforce resale prices.

For further details on resale price maintenance see Chapter 8.

- (iii) Dealer operates large department store or supermarket and is refused supplies although he meets suppliers selective distribution criteria.

In both the UK and the EEC the authorities have been critical of attempts by suppliers to hinder the growth of new retail methods. In Raleigh the manufacturers refused supplies to multiple retailers justifying the refusal on the basis that to do so might lead eventually to a reduction in the number of bicycle dealers. They contended that to supply multiple retailers who were not specialist, who might not provide dealer services and who would almost certainly undercut the prevailing price level would place intolerable sales pressures on specialist dealers whose margins would be eroded. The OFT decided that Raleigh's conduct was anti-competitive and referred the case to the MMC who likewise condemned Raleigh's distribution policy. The MMC recommended that Raleigh be required to supply discount and multiple retail stores where such stores observed the same standards of pre-sale inspection and technical services as comparable specialist outlets.²⁷⁸ Thus Raleigh could not hinder the multiples from stocking their bicycles where the latter provided adequate services. The fact that their prices might prove too competitive for some specialist dealers was not accepted. The OFT, in their report stated, "The Group's argument that to supply the multiple retailers would lead to a reduction in the number of bicycle dealers is one that has been advanced in the past in defence of resale price maintenance in various retail trades. If, on any wide scale, it emerged that consumers preferred lower prices to the advantages of specialised service or presentation, it has to be accepted that the number of bicycle dealers would decline. This would only be a symptom of a more competitive and cost conscious market."²⁷⁹

- (iv) Vertically integrated supplier of an important raw material refuses to supply a dealer because that dealer competes with the supplier's own dealers:

Where the supplier enjoys economic power such a refusal to deal may be an abuse of a dominant position, it would be subject to the CA 1980 in the UK and even the monopoly provisions of the FTA 1973.²⁸⁰ An example is found in the Commercial Solvents²⁸¹ case. CSC enjoyed a world monopoly over aminobutanol production, an input for certain drug manufacturing processes, in particular ethambutol production. Zoja obtained aminobutanol supplies from CSC via the latter's Italian subsidiary - ICI. Subsequently Zoja was refused supplies by ICI. The

European Court held the refusal to constitute an abuse of a dominant position designed to exclude Zoja from the market. They were unimpressed with the argument that ICI, having commenced production of ethambutol themselves there were no spare supplies of aminobutanol for Zoja. One important factor was that CSC had previously made an attempt to take over Zoja. The purpose of the (failed) attempt was presumed to be a desire to destroy Zoja as a competitor.

In the United Kingdom the OFT reported that the practice of Essex County Newspapers (ECN) in refusing to accept advertisements from estate agents since they competed with its own classified property advertising was anti-competitive under the CA 1980. They stated: "The Office has estimated that ECN has a dominant position in the newspaper property advertising market in the Colchester area, accounting for over 80 per cent of the value of total newspaper property advertising The Office accept the argument put forward by estate agents ... that the appearance of their advertising in ECN ... is highly important to their ability to gain new business and satisfy the requirements of their customers and that other media and form of advertising are essentially complementary to rather than substitutes for advertising in these newspapers. The Office concludes that because of its position in the property advertising market, ECN has the power to affect the relative ability of different property agents to compete in the Colchester area house agency market by its decisions on whether or not to accept the advertisements of individual agents. The Office also concludes that ECN had no grounds for its contention either that advertisements from [estate agents] competed with its business in a way that advertisements from orthodox estate agents did not, or that the public needed to be protected from advertisements from these undertakings."²⁸²

FOOTNOTES

1. Scherer, Industrial market structure and economic performance (2nd ed., 1980) at p. 587.
2. See Korah, Exclusive Dealing Agreements in the EEC: Regulation 67/67 replaced (1984); White, The New bloc-exemption Regulations on exclusive dealing (1984) E.L. Rev. 356
3. Commission Regulation (EEC) No. 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements, O.J. 1983 L173/1. See for minor amendments to the wording and grammar - Corrigenda O.J. 1983 L281/24. The only substantial difference is in relation to Article 5(3), due account has been taken of this in the text.
4. Commission notice concerning Commission Regulations (EEC) No. 1983/83 and (EEC) No. 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements: O.J. 1983 C355/7
5. In other contexts the European Court has stressed that such notices are only guides to interpretation. See, Witt v. Hauptzollamt Hamburg Ericus (Case 149/73) [1973] E.C.R. 1587 at p. 1593 in respect of the explanatory notes issued by the Commission on the Common Customs Tariff. Though that is a Council regulation and not a Commission regulation, though whether that is a useful distinction is questionable.
6. Commission Notice (supra) at para. 3.
7. ibid., at para. 2. See also Fonderies Roubaix v. Fonderies Roux (Case 63/75) [1976] 1 C.M.L.R. 538, [1976] E.C.R. 111; De Norre v. NV Brouwerij Concordia (Case 47/76) [1977] 1 C.M.L.R. 378, [1977] E.C.R. 65. In both cases the European Court construed Regulation 67/67/EEC by reference to the preamble thereby leading them to ignore the literal meaning of the Regulation.
8. See at paras. 8-16 and 27-29 of the explanatory notice.
9. Though if a dealer sells components as spare parts he will be reselling them albeit that most of the components may be used in the production of a main product by the dealer.
10. e.g., fizzy drinks dealer who adds gas and water to an essence supplied by the supplier; pharmacist who encapsulates and packs drugs for sale.
11. See Campari [1978] 2 C.M.L.R. 397, Campari Milano granted trademark licenses to its dealers who also purchased a secret concoction of herbs to which licensees (the dealers) added local wines in accordance with a specified recipe. Exemption was given by analogy to Regulation 67/67/EEC, the predecessor to Regulation 83/83/EEC. For Campari this was a cheaper and safer method of distribution than transporting heavy glass bottles.

12. In the explanatory notice the Commission note that they apply "... the same principles to agreements under which the reseller is supplied with a concentrated extract for a drink which he has to dilute with water, pure alcohol or another liquid and to bottle before reselling." If supplier X required supplier Y to add champagne to his essence then the addition would greatly increase the value of the finished product; if Y simply had to add cheap, local white wine then a much smaller increase would occur. See the Campari case supra - the addition of wine (which is not inherently cheap) appears not to disturb the exemption.
13. If a dealer sells moderately priced goods and provides expensive after-sales services and incorporates the price of the after-sales services into that for the goods then the Commission would probably undertake their own analysis of the relative costs for purposes of comparison.
14. para. 15 of the explanatory notice. The Possibility of delegation of responsibility by the supplier is expressly recognised in respect of exclusive purchasing under Regulation 84/83/EEC, See Article 1, 6 and 10 thereof.
15. A clause requiring the parties to ensure that connected undertakings discharge their duties properly will be exempt - para. 16 of the explanatory notice.
16. See Salonia v. Poidomani (Case 126/80) [1982] 1 C.M.L.R. 64. See also VDH Thirteenth Commission Competition Report (1983) p. 80 at para. 110. A German trade association held exclusive import rights in respect of Finnish wood, only members could import the wood. Following Commission intervention VDH issued a circular to its members making it clear that contracts between foreign suppliers and their agents should no longer include a clause restricting import transactions to certain purchasers. See also for a similar decision IMA Statuut O.J. 1980 L318 (26 Nov. 1980) noted in Tenth Commission Competition Report (1980) paras. 106, 107.
17. para. 14 of the explanatory notice.
18. See e.g. Junghans GmbH [1977] 1 C.M.L.R. D82 at para. 32 of the decision - Regulation 67/67/EEC (the predecessor to Regulation 83/83/EEC) held not to apply where supplier appointed three dealers in a territory, but Commission noted possibility of exemption by analogy to the Regulation.
19. See para. 19 of Explanatory Notice where Commission accept that different varieties of the same generic may constitute different product markets.
20. para. 27 of the explanatory notice. This has been strongly criticised. See Korah, op. cit., at pp. 14, 15.
21. La Maison de Bibliotheque [1984] 1 C.M.L.R. 261, Press Release IP (84) 16 (12 Jan. 1984).
22. If the supplier (French) had increased the price to the unsolicited customer (in Belgium) in the La Maison de Bibliotheque case supra, as a means of discouraging him and thereby increasing the incentive for him to go back to his local dealer that would have been unacceptable. Though, a dealer is not bound to sell to customers at the price and on the same terms as the supplier provides goods to the dealer - see Wooden Racing Kayaks Twelfth Commission Competition Report (1982) pp. 68, 69 paras. 79, 80.

23. See, De Norre v. NV Brouwerij Concordia (Case 47/76) [1977] 1 C.M.L.R. 378; [1977] E.C.R. 65.
24. See Europair International and Duro-Dyne Corp. [1975] 1 C.M.L.R. D62 (Commission decision) which was under the old Regulation 67/67/EEC only exempted agreements for a "defined area" of the EEC which, according to the decision, was an area less than the whole of the EEC.
25. Compact-Hydrotherm [1981] 3 C.M.L.R. 670; Hydrotherm v. Compact (Case 170/83)
26. See, La Maison de Bibliotheque [1984] 1 C.M.L.R. 261.
27. See paragraph 8 of the preamble to Regulation 83/83/EEC. Thus the Commission's decision in BP Kemi [1979] 3 C.M.L.R. 684 is unlikely now to be followed - supplier reserved right to supply large users; the Commission decided that the exemption in Regulation 67/67 only applied where a very clear division of functions existed between supplier and dealer.
28. Thus paragraph 17 of the explanatory notice states: "If they agree on further obligations restrictive of competition, the agreement as a whole is no longer covered by the block exemption and requires individual exemption. For example, an agreement will exceed the bounds of the Regulation if the parties relinquish the possibility of independently determining their prices or conditions of business or undertake to refrain, or even prevent, cross-border trade, which the Regulations expressly state must not be impeded. Among other clauses which in general are not permissible under the Regulations are those which impede the reseller in his free choice of customers."
29. paragraph 8 of the preamble and paragraph 18 of the explanatory notice.
30. [1978] 2 C.M.L.R. 397.
31. BMW [1975] 1 C.M.L.R. D44; SABA [1976] C.M.L.R. D61 at para. 37. But c.f. Stoves and Heaters [1975] 2 C.M.L.R. D1 at p. D39 para. 39.
32. Kodak [1970] C.M.L.R. D19; Omega [1970] C.M.L.R. D49.
33. BMW [1975] 1 C.M.L.R. D44.
34. *ibid.* But note that under the exclusive purchasing Regulation 84/83/EEC the requirement that the dealer accept minimum quantities of goods is limited only to those goods that are subject to the exclusive purchasing requirement.
35. See generally, Baden Fuller, Economic Issues relating to Property rights in Trademarks: Export bans, differential pricing, restrictions on resale and repackaging (1981) E.L. Rev. 162.
36. The obligation to sell in the suppliers packaging is not a restrictions within Article 85(1): Dupont de Nemours [1973] C.M.L.R. D226 at p. D228; BMW *supra* at para. 32 of the decision but c.f. Hoechst-Beecham Pharma Bull E.C. 7-8/76 at para. 2122; Hydrotherm v. Compact (Case 170/83)
37. See the German Case, Rose Marie Reid O.L.G. Stuttgart (23 Jan. 1976) WuW/E O.L.G. 1674 at p. 1678.
38. e.g. Krupps O.J. 1980 L120/26 at p. 28 para. 15 (Commission decision granting negative clearance).

39. *ibid.*
40. para. 6 of preamble.
41. BMW [1975] 1 C.M.L.R. D44 at para 30.
42. *ibid.*, at para. 31 of the decision.
43. *ibid.*, at para. 30 of the decision.
44. *ibid.* See also Krupps O.J. 1980 L120/26 at p. 27 para. 14. Such a requirement is potentially a restriction under Article 85(1) but usually will be given negative clearance on a *de minimis* basis i.e. no appreciable effect on competition.
45. See Ford Garantie Deutschland Thirteenth Commission competition report (1983) pp. 78, 79 para. 104-106, the Commission, in response to complaints by the European Bureau of Consumers Unions, intervened to prevent what they suspected was a dealer cartel attempting to prevent parallel imports. The dealers had advertised in German newspapers saying: "We do not carry out guarantee work on new Ford cars reimported after being purchased elsewhere in the European Community." Following Commission pressure the dealers publically retracted this statement. In Constructa Fourth Commission Competition Report (1974) paras. 109 - Commission persuaded the supplier (a manufacturer) to organize after-sales service in such a way that it would be available throughout the Common Market regardless of country of purchase. See also Seventh Commission Competition Report (1977) pp. 24-26 paras. 17-20 for general commentary on after sales services and competition law. See also, Omega [1970] C.M.L.R. D49; BMW [1975] 1 C.M.L.R. 44; SABA [1976] 1 C.M.L.R. D61 (all Commission decisions).
46. Seventh Commission Competition Report p. 25 para. 19: "In the electrical appliances industry the guarantee can be of particular importance. But difficulties have arisen because of different technical and safety standards in the Member States of the Community. Certain manufacturers have invoked these differences as grounds for refusing to grant a guarantee for parallel imports or use of their products in a Member State other than that to which they were originally imported. The Commission has not accepted the argument. It has concluded that these differences are not so great as to raise an insurmountable barrier to trade in the relevant goods and that the relevant exporters ought to be free to assess the business value of making any alterations that may be necessary." See also AEG Telefunken Fourth Commission Competition Report (1974) para. 106.
47. paragraph 17 of the explanatory notice, and, paragraph 8 of the preamble to Regulation 83/83/EEC.
48. See para. 10 of the preamble, and, paras. 21-23 of the explanatory notice.
49. See para. 21 of the explanatory notice: "In certain cases ... goods can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed."

64. e.g. the alternative supplies have slight differences in construction in order to qualify for safety standards in that State. However, the changes mean that they are incompatible with safety or quality control standards in the exclusive dealers own territory.
65. Thus, if alternative supplies are available within the Common Market it is only these supplies which must not be hindered. Alternative supplies from outside of the EEC may be hindered without endangering the bloc-exemption in such circumstances.
66. para. 11.
67. para. 33.
68. See e.g. Consten and Grundig v. Commission (Case 56 and 58/64) [1966] C.M.L.R. 418, [1966] E.C.R. 299; Bequelin Import v. Import-Export (Case 22/71) [1972] C.M.L.R. 81, [1971] E.C.R. 949 at p. 961; Theal-Watts [1977] 1 C.M.L.R. D44; Garoché v. Striker Boats (Nederland) [1974] 1 C.M.L.R. 469; Hydrotherm v. Compact (Case 170/83).
69. See Kalsbeek v. Sociale Verzekeringsbank (Case 100/63) [1964] C.M.L.R. 548, [1964] E.C.R. 565 at p. 575 - in the absence of an unequivocal provision stating otherwise legislation is presumed not to be retroactive. Article 6 is silent on retroactivity so that the presumption would appear to apply. See also, Commission v. Germany (Case 70/72) [1973] C.M.L.R. 741, [1973] E.C.R. 813 at p. 844 per Advocate General Mayras; IRCA (Case 7/76) [1976] E.C.R. 1213 at p. 1237-1239 per Advocate General Warner. Furthermore, the European Court has held that retroactivity is unlawful unless a valid reason may be propounded justifying it: Racke [1979] 1 C.M.L.R. 552, [1979] E.C.R. 69 at para. 20 of the judgment.
70. See generally Usher, The Influence of National Concepts on Decisions of the European Court (1976) E.L. Rev. 359.
71. See e.g. Deuka v. EVGF [1975] 2 C.M.L.R. 28, [1975] E.C.R. 421; Töpfer v. Commission (Case 122/77) [1978] E.C.R. 1019.
72. Article 7 of the Regulation.
73. Article 8 of the Regulation.
74. See e.g. Société Technique Minière v. Maschinenbau Ulm (Case 56/65) [1966] C.M.L.R. 357, [1966] E.C.R. 235 at p. 250. The Commission will consider, "... the nature and quality, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement, or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel exportation and importation."
75. *ibid.*

76. See, Consten and Grundig v. Commission (Cases 56, 58/64) [1966] C.M.L.R. 418, [1966] E.C.R. 299; Du Pont de Nemours Deutschland [1973] C.M.L.R. D226; Deutsche Philips GmbH [1973] C.M.L.R. D241; Junghans [1977] 1 C.M.L.R. D82; Theal-Watts [1977] 1 C.M.L.R. D44; Gerofabriek [1977] 1 C.M.L.R. D35; Distillers [1978] 1 C.M.L.R. 400; Teacher [1978] 3 C.M.L.R. 290. For more recent examples see Polistil and Arbois [1984] 2 C.M.L.R. 594; Euglucon 5 Thirteenth Commission Competition Report(1983) at pp. 79, 80 paras. 107-109; and see also John Deere O.J. 1985 L35/58 where a fine of 2m ECU was imposed upon the supplier (approx £1.2m) for enforcing export prohibition clauses in distributorship agreements; and see Application of the Federación Nacional de Cafeteros de Colombia [1983] 1 C.M.L.R. 703.
77. See e.g. John Deere O.J. 1985 L35/58 at pp. 63, 64 paras. 35-42: "Dealers which accept contracts containing export bans are also guilty of an infringement and, if the agreements are not notified, they also are liable for fines. However, the contractual export bans in this case are contained in preprinted standard contracts; clearly, therefore, the dealers had not taken the initiative to have the bans included in their contracts and had largely ignored them. Moreover, this is the first such case in the agricultural machinery sector. The Commission feels it appropriate, therefore, not to impose a fine on the dealers in this case." (ibid., at p. 64 para. 42). The supplier was fined 2mECU.
78. Bequelin Import v. Import and Export Co. (Case 22/71) [1972] C.M.L.R. 81, [1971] E.C.R. 949. See also, AEG Telefunken fourth Commission Competition Report (1974) at para. 106 - In principle national technical safety standards and regulation in the Member State of destination do not justify export prohibitions. See for examples under Article 86 EEC: General Motors v. Commission (Case 26/75) [1976] 1 C.M.L.R. 95, [1975] E.C.R. 1367 - dominant undertaking abused its position by exploiting the statutory monopoly it enjoyed to supply conformity certificates and identity signs in respect of the import of Opel cars into Belgium; French Mineral Water Companies Bull E.C. 4/76 at para. 2111. For an analogous U.S. decision, see Bunch v. Artec International Corp. 559 F. Supp. 961 at pp. 971-972 (S.D.N.Y. 1983).
79. Transocean Marine Paint I [1967] C.M.L.R. D9; Transocean Marine Paint II [1974] 1 C.M.L.R. D11; Rank-SOPELEM [1975] 1 C.M.L.R. D72.
80. Transocean Marine Paint I (supra)
81. See Article 2(1) of Regulation 83/83/EEC O.J. 1983 L173/1 and see para. 30 of explanatory notice to Regulation 83/83/EEC, O.J. 1983 C355/7.
82. Rank-SOPELEM [1975] 1 C.M.L.R. D72.
83. See, e.g. German Spectacle Frames [1985] 1 C.M.L.R. 574 dealers allowed to sell solely to end consumers i.e. not to other dealers who might parallel import the spectacle frames out of the country. The clause was reinforced by an export ban. The parties modified the clauses so as to comply with Commission wishes; FEDETAB [1978] 3 C.M.L.R. 524 (Commission decision); Omega [1970] C.M.L.R. D49; Sperry Rand Fourth Commission Competition Report (1974) at para. 104. Even cross-deliveries bans between parties in the same Member State may affect trade between the Member States and trigger the prohibition in Article 85: SABA notice under Article 19(3) of Regulation 17/62/EEC O.J. 1972 C116/4; Deutsche Philips GmbH [1973] C.M.L.R. D241; BMW [1975] 1 C.M.L.R. D44; Gerofabriek [1977] 1 C.M.L.R. D35.

84. e.g. re Wholesalers - SABA [1976] 1 C.M.L.R. D61; Sperry Rand Fourth Commission Competition Report (1974) at para.107.
85. See e.g. Omega [1970] C.M.L.R. D49; BMW [1975] 1 C.M.L.R. D44; SABA [1976] 1 C.M.L.R. D61 (Commission decision).
86. SABA (supra) and before the European Court - (Case 26/76) [1978] 2 C.M.L.R. 1, [1977] E.C.R. 1875.
87. See e.g. Zanussi [1979] 1 C.M.L.R. 81; Moulinex and Bauknecht Tenth Commission Competition Report (1980) pp. 82, 83 para 121; Matsushita Electrical Trading Company Twelfth Commission Competition Report (1982) pp. 67, 68 paras. 77, 78; Ford Garantie Deutschland Thirteenth Commission Competition Report (1983) p.78. The Commission also take a strict view of suppliers who hinder or prevents parallel imports of their own goods by refusing to grant certificates of conformity to the imports where that supplier has a statutory monopoly over the supply of such certificates - see Derek Merson v. British Leyland [1984] 3 C.M.L.R. 92 (BL fined £208,000 for breach of Article 86 EEC). See also Alfa Romeo Cars [1985] 1 C.M.L.R. 481 where, for a similar breach the Company was not fined and the case was settled informally.
88. The literature on the problem is voluminous. See: Van Bael, Heretical Reflections on the Basic Dogma of EEC Antitrust: Single Market Integration (1980) *Revue Suisse de Droit International de la Concurrence* 39; Korah, Goodbye, Red label; condemnation of dual pricing by Distillers (1978) *E.L. Rev.* 62; Baden Fuller, Economic Issues relating to Property Rights in trademarks, export bans, differential pricing, restrictions on resale and repackaging (1981) *E.L. Rev.* 162; Chard, The economics of the application of Article 85 to Selective distribution systems (1982) *E.L. Rev.* 83; Gyselen, Vertical restraints in the distribution process: strength and weakness of the free rider rationale under EEC Competition law (1984) *C.M.L. Rev.* 647; Saint-Gal, Concurrence déloyale et concurrence parasitaire (ou agissements parasitaires) 1956 *R.I.P.I.A.* 19; Gellhorn, Antitrust law and Economics (2nd ed., 1981) pp. 265-277.
89. See Transocean Marine Paint I [1967] C.M.L.R. D9; Rank-SOPELEM [1975] 1 C.M.L.R. D72; Campari [1978] 2 C.M.L.R. 397; Distillers, notice pursuant to Article 19(3) of Regulation 17/62/EEC, O.J. 1983 C245/3.
90. See for an analogous U.S. case Donald Rice Tire Co. v. Michelin Tire Corp. 483 F. Supp. 750 at p. 757 (D. Md. 1980) where the Court differentiated between a new manufacturer seeking penetration and an old manufacturer with a new product. The latter is not treated as a new entrant.
91. Consten & Grundig v. Commission (Case 56, 58/64) [1966] C.M.L.R. 418, [1966] E.C.R. 299 at p. 342: "although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article 85(1) merely because it might increase the former."
92. See Article 2(2)(c) of Regulation 83/83/EEC.

93. In the Common law of restraint of trade the Courts have apparently taken the view that exclusive dealing agreements are perfectly reasonable and valid. See, North West Salt v. Electrolytic Alkali Co. [1914] A.C. 461; Boat Showrooms of London v. Horne Bros. (1980) unreported; Evans Marshall v. Bertola [1973] 1 All E.R. 992. However exclusive purchasing agreement are very much subject to the law of restraint of trade, see e.g. the solus cases: Alec Lobb v. Total Oil [1985] 1 W.L.R. 173; Esso Petroleum v. Harpers Garage (Stockport) [1968] A.C. 269.
94. Section 35(1) RTPA 1976.
95. Section 35(2) RTPA 1976. See, Chapter 5 Section G for details of such cases.
96. See No. 5028 Register of Restrictive Trade Practices Distributorship agreement between Tamglass OY and Legibus Forty-four limited; No. 4890 Register of Restrictive Trade Practices. Agreement between Erskin Westayr (Engineering) Limited, Siemens A/S, and, Siemens Limited; Nos. 4642, 4643, 4644, 4645 and 4886 Register of Restrictive Trade Practices whereby certain hatcheries are given exclusive rights in a defined area to a breed of chicken called Hisex; see also No. 4887 Register of Restrictive Trade Practices between 3 companies 2 of whom agree not to make retail sales of bubble-gum vending machines in the others territory apart from the supplying of established customers there.
97. 18 May 1983.
98. *ibid.*, at pp. 37, 38 para. 8.14.
99. 22 February 1984.
100. *ibid.*, at pp. 41, 42 para. 8.6. But see also, British Railways Board (18 May 1983) at p. 38 paras. 8.15, 8.16 where the OFT appeared to take into account various economic arguments of this nature although they stated, somewhat obliquely, "The Office has not been able to measure the effects of these benefits. The Office considers, however, that they do not bear on the conclusion that there is an anticompetitive practice in terms of the Act."
101. *ibid.*
102. *ibid.*, at p. 42 para. 8.7.
103. See e.g. Book Clubs Exclusive Book Club rights DGFT Report (1983) at p. 107. The OFT persuaded 4 major book clubs to voluntarily limit the extent to which they would obtain exclusive book club rights to any title. The OFT were worried that the acquisition of exclusive rights could have resulted in an undue concentration of the more popular and important titles. This would limit the range of books open to smaller book clubs and, moreover, the limited availability would create entry barriers to new firms.
104. 18 May 1983 at p. 38 para. 8.17. De minimis is not apparently considered a public interest argument.
105. *ibid.*, at p. 37 para. 8.11.

106. O.J. 1983 L173/5 (30 June 1983).
107. See ~~Seventh~~ Commission Competition Report (1977) pp. 21-24 paras. 9-16. For an American view see Standard Oil Co. of California v. U.S. (1949) 337 U.S. 293 at pp. 306, 307.
108. Brasserie de Haecht v. Wilkin (No. 1) (Case 23/67) [1978] C.M.L.R. 26, [1967] E.C.R. 407; De Norre v. Concordia (Case 47/76) [1977] 1 C.M.L.R. 378, [1977] E.C.R. 65. This view is confirmed by the Commission in para. 3 of the preamble to Regulation 84/83/EEC.
109. This raises an interesting question of English contract law. An agreement between a dealer and manufacturer whereby the dealer purchases exclusively from the wholesaler will be unenforceable by the wholesaler who will have paid no consideration for the advantage of being the exclusive supplier. If the wholesaler is made a party to the agreement this will be a tri-partite agreement whereas the bloc-exemption only allows bi-partite agreements. One possible but artificial solution is for the manufacturer to sign the agreements as agent for the wholesaler who will be the principal. This should give the principal the right to enforce the contract. Alternatively, the manufacturer may enforce the contract if the dealer purchases from someone other than the designated supplier thereby breaching the contract.
110. para. 35 of the explanatory notice.
111. Though if a dealer must take 60% of his supplies from a main supplier and 40% from a supplier "connected" to the main supplier within the meaning of Article 4 then exemption presumably remains. The two suppliers are treated as one economic unit.
112. para. 6.
113. But c.f. Hoffman-la Roche v. Commission (Vitamins) (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461.
114. Or the manufacturer if the agreement is between the dealer and the manufacturer and the agreement specifies another undertaking as the supplier.
115. para. 35 of the explanatory notice.
116. para. 37 of the explanatory notice. See, Korah, op cit., at pp. 34, 35 on the meaning of the word "distribute" in the light of the various language versions of the Regulation.
117. ibid.
118. In some EEC countries, for example Germany, there is statutory regulation of commercial activity which prevents such dual functioning.
119. para. 36 of the explanatory notice.
120. This is confirmed by para. 38 first sentence of the explanatory notice.
121. [1985] 1 C.M.L.R. 735.

122. This provision follows the pattern of Article 85(1)(c) EEC which prohibits agreements which: "make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."
123. See para. 38 of the explanatory notice.
124. The 'technical relationship' exception has been accepted in U.S. antitrust jurisprudence. See, U.S. v. Jerrold Electronics Corp. 187 F. Supp. (E.D. Pa. 1960) aff'd per curiam (1961) 365 U.S. 567 (television and service and installation contract); Dehydrating Process Co. v. A.O. Smith Corp. 292 F. 2d. 653 (1st Cir. 1961) cert. denied, 368 U.S. 931.
125. See the factual background to International Business Machines Corporation v. Commission (Case 60/81) [1981] 3 C.M.L.R. 635 [1980] E.C.R. 2639 at pp. 2641-2643.
126. See para. 22 of the preamble to the Regulation commented on by White, (1984) E.L. Rev. 356 at p. 365
127. para. 38 of the explanatory notice.
128. *ibid.*, para. 39.
129. The tied public house question raised very considerable interest in the Parliament. See W.Q. No. 2363/82, O.J. 1983 C279/1; W.Q. No. 2187/82 O.J. 1983 C266/2; W.Q. No. 2326/82, O.J. 1983 C266/4; W.Q. No. 197/83, O.J. 1983 C266/21; WQ No. 1720/84, O.J. 1985 C 85/20
130. para. 40 of the explanatory notice.
131. *ibid.*, at para. 41.
132. *ibid.*, at para. 42.
133. para. 13 of the preamble.
134. para. 43 of the explanatory notice.
135. *ibid.*, at para. 44.
136. *ibid.*, at para. 45.
137. "same type" is defined in Article 7(2) as corrected by Corrigenda O.J. 1983 L281/24 (13 Oct. 1983)) as: "Beers or other drinks are of different types where they are clearly distinguishable by their composition, appearance or taste."
138. para. 48 of the explanatory notice. If a pub is famed for its home-brewed beer or for the beer of a specialised local brewer then customers might consider the existence of these other draught beers as important. The dealer will be able to prove "sufficient demand" in such cases.

139. Pub goers in the UK will appreciate that speciality beers often have a dedicated band of followers. However, they will also appreciate that such beers are usually advertised from the rear or back counter of the bar whereas the main draught beers are sold and advertised from the front or main counter of the bar. A restriction in respect of the advertising of beers which requires the dealer to give preference to the main suppliers beers is exemptable under Article 7(1)(c).
140. para. 49 of the explanatory notice.
141. *ibid.*, at para. 50. The Commission state, *inter alia*; "In doubtful cases, whether or not two beers are clearly distinguishable by their composition, appearance or taste depends on custom at the place where the public house is situated. The parties may, if they wish, jointly appoint an expert to decide the matter."
142. *ibid.*, at para. 51. Para. 52 provides for the Commission's policy on amusement machines: "The installation of amusement machines in tenanted public houses may by agreement be made subject to the owner's permission. The owner may refuse permission on the ground that this would impair the character of the premises or he may restrict the tenant to particular types of machines. However, the practice of some owners of tenanted public houses to allow the tenant to conclude contracts for the installation of such machines only with certain undertakings which the owner recommends is, as a rule, incompatible with this Regulation. Such private restrictions affecting the operations of undertakings installing amusement machines are not in breach of Community law, however, if the undertakings are selected on the basis of objective criteria of a qualitative nature that are the same for all potential providers of such equipment and are applied in a non-discriminatory manner. Such criteria may refer to the reliability of the undertaking and its staff and the quality of the services it provides. The supplier may not prevent a public house tenant from purchasing amusement machines rather than renting them." It is not known what the Commission's attitude will be towards excessive pricing of goods by the supplier as a *quid pro quo* for not being able to totally control the dealer's business. See for an example W.Q. 1720/84, O.J. 1985 C85/20 (3.4.85) where it is alleged that Bass Holdings Ltd. imposed surcharges on cases of spirits and wine which, in one instance, led to a sum of £365,50 per annum being added to rent. The MEP asking the question stated that this had been done to recover any losses due to the EEC Regulation.
143. It is understood that the provision was the subject of heated argument between the National Union of Licensed Victuallers and the Brewers Society both of whom made repeated, detailed submissions to the Commission during the drafting of the Regulation. See *Carlsberg* O.J. 1985 L207/26 at pp. 30, 31 where the Commission note that in the UK nearly two-thirds of all sales of beer are sold via outlets owned by the brewery companies. Thus tenanted outlets are very common.

144. See Commission answer to W.Q. No. 2187/82 O.J. 1983 C266/2 at p.3. The question asked, inter alia, the Commission to respond to the assertion " that where tenants are permitted to purchase from independent suppliers, the suppliers are normally required to pay the brewers royalties or other penalties thus increasing the price the ultimate consumer has to pay." The Commission responded, inter alia, "Furthermore, the right of the brewer to impose an exclusive tie for beer as well as for other drinks is subject to strict conditions: in the case of loan agreements, the duration of the tie may not exceed five years, the contracts must contain a so-called 'English clause' which enables the tenant to obtain the drinks, other than beer, normally covered by the exclusive purchasing obligation from third parties, if the brewer is not willing or able to supply these products at prices and conditions prevalent on the free market."
145. para. 54 of the explanatory notice. Though, the duty to inform the main suppliers does not apply where the second category of case occurs (i.e. different trade marks) - para. 56 of the explanatory notice.
146. *ibid* at para. 55. It will be noted that the Commission have the power to withdraw exemption by formal decision under Article 14(b).
147. *ibid*. See e.g. *Hoffman La Roche v. Commission* (Case 85/76) 3 C.M.L.R. 211, [1979] E.C.R. 461.
148. *ibid.*, at para. 57.
149. See Commission answer to W.Q. No. 264/83, O.J. 1983 C266/25 at p. 26. See also para. 64 of the explanatory notice which is less clear on this point.
150. See generally, Green, *European Community law and Solus Sites: The New Regulation on Exclusive Purchasing* [1983] *Oil and Gas Law and Taxation Review* 74.
151. *ibid.*, paras. 58-60.
152. e.g. additives and brake fluids.
153. para. 61 of the explanatory notice.
154. *Quaere*: If a service station owner leases for 51 years the station to an oil company who then leases the premises back for 21 years, is the original owner who is now a sub-lessee in occupation because of the oil company (the supplier) or, is he in occupation in his own right? In *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.* [1985] 1 W.L.R. 173 (C.A.) the Court held, on facts similar to those above, that an agreement was not void for restraint of trade. The Court seemed to treat the original owner who became a lessee as if he were in occupation as the oil company's tenants. They pointed out that at the end of the agreement the oil company would enjoy a long residual tenancy and in reality the 21 year lease was similar to a mortgage.
155. See *Morris*, *Requirements contracts and their Treatment under the EEC Treaty* (1981) *E.L. Rev.* 257.
156. *Hoffman la Roche v. Commission* (Case 85/76) [1979] 3 C.M.L.R. 211 at p. 289, [1979] E.C.R. 461 at p. 539. See also, *British Industrial Sand Limited Sixth Commission Competition Report* (1976) at paras. 122-125.

157. Soda Ash [Eleventh Commission Competition Report (1981) pp. 53, 54 paras. 73-76, noted also at [1983] F.S.R. 61.
158. Seventh Commission Competition Report (1977) p. 24 para. 15. See also Commission answer to W.Q. No. 1049/82 O.J. 1982 C312/16.
159. See, BP Kemi-DDSF [1979] C.M.L.R. 684 at p. 699. See also, Billiton and Metal & Thermit Chemicals, Seventh Commission Competition Report (1977) pp. 104, 105 para. 131. Supplier was the largest EEC producer of the product; the customer was the largest EEC purchaser and took 50% of the supplier's entire output. The significant market power of both parties encouraged the Commission to challenge the agreement (see, *ibid.*, at pp. 23, 24 paras. 14, 15). The parties agreed following negotiations to modify their agreement so as to provide for supply on a normal commercial basis involving no restrictions. See also Prym-Beka [1973] C.M.L.R. D250.
160. BP Kemi-DDSF *supra* at p. 699.
161. In Soda Ash Seventh Commission Competition Report (1977) at p. 54 para. 74 the parties, following negotiations with the Commission, agreed to reduce 5 years agreements to 2 years.
162. See, BP Kemi-DDSF [1979] 3 C.M.L.R. 684 at p. 699: "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 enables the purchaser to decide freely which of the offers is the most attractive when all factors are taken into account."
163. *ibid.*
164. See, British Industrial Sand Limited Sixth Commission Competition Report (1976) paras. 122-125.
165. [1985] 1 C.M.L.R. 735.
166. *ibid.*, at p. 31.
167. *ibid.*, at p. 34 para. 8.
168. per Advocate General Reischl in Hoffman-la Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461. See also Article 8(2)(a) Regulation 83/83/EEC, O.J. 1983 L173/5 at p. 9 where the Commission recognise the utility of pure English clauses devoid of other limitations.
169. See *ibid.*, at [1979] 3 C.M.L.R. 211 at p. 294, [1979] E.C.R. 461 at p. 545: "In fact the English clause under which Roche's customers are obliged to inform it of more favourable offers made by competitors together with the particulars above mentioned - so that it will be easy for Roche to identify the competitor - owing to its very nature, places at the disposal of [Roche] information about market conditions and also about the alternatives open to, and the actions of, its competitors which is of great value for the carrying out of its market strategy."

170. BP Kemi-DDSF [1979] 3 C.M.L.R. 684 - dealer could only accept rival offers if the quantity offered corresponded to the dealers total annual requirement thus rendering impossible the acceptance of small volume purchases. Furthermore, dealers could only accept such offers from "serious" Western European suppliers.
171. See e.g. Brasserie de Haecht v. Wilkin (No. 1) (Case 23/67) [1968] C.M.L.R. 26 [1967] E.C.R 77 : "Agreements whereby an undertaking agrees to obtain its supplies from one undertaking to the exclusion of all others do not by their very nature necessarily include all the elements constituting incompatibility with the Common Market as referred to in Article 85(1) of the Treaty. Such agreements may, however, exhibit such elements where, taken either in isolation or together with others, and in the economic and legal context in which they are made on the basis of a set of objective factors of law or of fact, they may affect trade between Member States and where they have either as their object or effect the prevention, restriction or distortion of competition."
172. O.J. 1983 L 114/26 (29 April 1983).
173. For the EEC meaning of "resale" see Article 1 Regulation 84/83/EEC on bloc-exemption for exclusive purchasing and the explanatory notice issued by the Commission at paras. 9 and 10, O.J. 1983 C355/7 at p.8. This is an important word and defines how much processing or reprocessing a dealer may do before the goods he purchases are transformed into a completely new product and sold anew.
174. The word "sale" is implicitly given a wide meaning in Regulation 84/83/EEC on bloc-exemption for exclusive purchasing. Para. 11 of the Commission's explanatory notice states: "The hiring out of goods in return for payment comes closer, economically speaking, to a resale of goods than to provision of services. The Commission therefore regards exclusive agreements under which the purchasing party hires out or leases to others the goods supplied to him as covered by the Regulations."
175. No. 5044 Register of Restrictive Trade Agreements. (Agreement dated 1981).
176. See for an analogous case London Weekend Television - Football League DGFT Annual Report (1979) p. 46.
177. Car Parts, HC 318 (February 1982).
178. *ibid.*, at para. 6.5.
179. *ibid.*, at para. 6.25.
180. *ibid.*, at para. 6.30. See also for back up to the MMC view that exclusive purchasing tends to lead to higher prices, 'Prices, Costs and Margins in the Manufacture and Distribution of Car Parts' H.C. 220, October 1979, Report of the Price Commission, paras. 76 and 99 of summary.
181. See MMC Report on Liquified Petroleum Gas H.C. 147 (1980-81).
182. A Report on the Supply of Petrol to Retailers in the United Kingdom (1965) Cmnd. 264.

183. e.g. Report on the supply of metal containers H.C. 6 (July 1970). MMC objected to contracts of over 2 years duration under which the purchaser had to take specific quantities of cans from Metal Box, the dominant supplier. The purchasing clause was partial not exclusive in this case. But c.f. Alec Lobb v. Total Oil [1985] 1 W.L.R. 173 long term purchasing obligation reasonable where offset by commercial advantages. Noted Green (1985) O.G.L.T.R. 277.
184. MMC Report on Wallpaper H.C. 59 (January 1964) at para. 174.
185. J.O. 1962 139/2921 (24 December 1962).
186. *ibid.*, at Section II. See Italy v. Council and Commission (Case 32/65) [1966] C.M.L.R. D9, [1966] E.C.R. 389 at pp. 467 and 484 - Article 85(1) is inapplicable because the agent is "incorporated" into the suppliers organisation; European Sugar Cartel (Suker Unie) (Cases 40-48, 50, 54-56 and 111/73) [1976] 1 C.M.L.R. 295, [1975] E.C.R. 1663 at p. 2007: "If such an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus like a commercial employee forms an economic unit with that undertaking." For a case before the German Courts see, BGH 23 September 1975, W.R.P. 1975, 733 EDV-Zubehör (data processing supplies).
187. The *del credere* is a contractual promise by the agent to indemnify the principal should he suffer a loss as the result of the failure of a customer, introduced by the agent, to pay the purchase price. The *del credere* agent does not undertake to indemnify the principal in any event in which the transaction is not carried out e.g. if a perfectly solvent purchaser refuses to accept the goods and therefore refuses to pay the price. Sometimes the principal increases the agents commission in consideration for the latter's *del credere* liability. The standard *del credere* agency agreement issued by the Institute of Export contains the following clause:
- "(a) The Agent shall undertake *del credere* responsibility in respect of every sale by him of the company's goods.
 - (b) In respect of all such sales the agent hereby agrees to indemnify and keep indemnified the company against all loss (or loss up to ... per cent) caused by the failure on the part of any purchaser to pay the whole or part of the purchase price where such failure arises out of the purchaser's insolvency or inability to pay.
 - (c) The company agrees to pay the Agent *del credere* commission at the rate of ... per cent on the terms provided by paragraph ... hereof."
188. See, Pittsburgh Corning Europe [1973] C.M.L.R. D2.
189. See e.g. European Sugar Cartel (Suker Unie) (Cases 40-48, 50, 54-56 and 111/73) [1976] 1 C.M.L.R. 295, [1975] E.C.R. 1663.
190. See Potash I [1973] C.M.L.R. D219.
191. If the goods of Y and Z are in competition with each other the Commission might have greater cause for concern since such an agreement would be very similar to that of rival suppliers appointing the same commercial agent. In such a case there could be scope for competition between Y and Z to be restricted. Indeed, there could be a covert agreement between Y and Z. In a genuine case Z would not make X his exclusive dealer because X would already be holding a competing product and X could not therefore take Z's goods subject to an exclusive purchasing obligation.

192. 10 October 1984.
- 193, *ibid.*, at p. 44 para. 7.4.
194. Times, 8 November 1984, 'Franchising for 350,000 jobs.
195. See, Adams and Pritchard Jones, *Franchising, Practice and precedents in business format franchising* (1981); European Commission Study, *The Co-operation between Firms in the Community: Franchising (series Commerce and Distribution)* 1978 No. 5; Goebel, *The Uneasy Fate of Franchising Under EEC Antitrust Laws* (1985) E.L. Rev. 87.
196. The California Franchise Investment Law (1971) Cal. Comp. Code Paras. 31,000-31,516 (West Supp. 1972) defines a franchise as following:
"A contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor ... the franchisee's business pursuant to such plan or system ... substantially associated with the franchisor's trade mark, service mark, trade name, logo type, advertising or other commercial symbol designating the franchisor or its affiliate." The International Franchise Association defines a franchise as:
"A franchise operation is a contractual relationship between the franchisor and franchisee in which the franchisor offers or is obliged to maintain a continuing interest in the business of the franchisor in such areas as know-how and training; wherein the franchisee operates under a common trade name, format or procedure owned or controlled by the franchisor, and in which the franchisee has or will make a substantial capital investment in his business from his own resources."
197. See W.Q. No. 1694/79 O.J. 1980 C131/33
198. See e.g. *Brasserie de Haecht SA v. Wilkin No. 1* (Case 23/67) [1968] C.M.L.R. 26, [196] E.C.R. 407; *De Norre v. NV Brouwerij Concordia* (Case 47/76) [1977] 1 C.M.L.R. 378, [1977] E.C.R. 65.
199. For a development of this argument see, Adams and Pritchard Jones *op. cit.*, at pp. 38.40.
200. European Commission Study, *The Co-operation between firms in the Community: Franchising (series Commerce and Distribution)* 1978 No. 5.
201. See chapter 11 Section M
202. The American view of this is instructive. See, *Principe v. McDonald's Corp.* 631 F. 2d 303 (4th Cir. 1980) per Phillips J. "Given the realities of modern franchising, one thinks the proper inquiry is not whether the allegedly tied products are associated in the public mind with the franchisors' trademark, but whether they are integral components of the business method being franchised. Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie-in exists as a matter of law." See also, *New Jersey v. Lawn King* 978 A.T.R.R. at F-1 (21 August 1980), 84 N.J. 179. The old stricter rule in *Siegel v. Chicken Delight Inc.* (1970) 311 F. Supp. 847 *aff'd* 448 F. 2d. 43 seems to have been limited much more closely to its own facts.

203. Regulation 83/83/EEC Article 2(3)(b).
204. Regulation 83/83/EEC Article 2(3)(c).
205. Many of the example clauses given in this section are drawn from cases registered with the OFT and given Section 21(2) dispensation. For examples of franchise agreements see: No. 4578 Register of Restrictive Trade Practices, Franchise between Pronuptia and Youngs (franchise) Ltd. and franchisees for the sale of bridal wear and accessories (1982) (useful precedent); No. 4889 Register of Restrictive Trade Agreements, franchise between Youngs Formal Wear and franchisees for men's formal dress wear (1982); No. 5149 Register of Restrictive Trade Agreements, franchise relating to the supply of sandwiches and other allied food products under the trade name Dial-a-Sandwich (1983); No. 5325 Register of Restrictive Trade Agreements, franchise concerning leather and imitation leather goods, travel bags, sports bags, suitcases, leather goods, accessories and ancillary goods (1983); Nos. 4103 and 4104 Register of Restrictive Trade Agreements, concerning the operation of ice cream parlours (1981); No. 3262 Register of Restrictive Trade Practices, franchise concerning wallpaper and paints (1974).
206. See Chapter 1 Section E for details.
207. See Chapter 1 Section E for details and Chapter 11 Section I.
208. See Chapter 2 Section I for details.
209. See Chapter 2 Sections K and L for details. and Chapter 13.
210. See Liesner Committee Report, A Review of Restrictive Trade Practices Policy Cmnd. 7512 (1979) p. 39 para. 5.20.
211. See, Registrar of Restrictive Trading Agreements v. Schweppes (1971) L.R. 7 R.P. 336 at p. 375.
212. Schedule 3(4) RTPA (trade marks) and Schedule 3(2) and (7) territorial restrictions.
213. See Chapter 2 Section I for details.
214. See Chapter 1 Section E for details. See Chapter 8 Section H for details
215. Section 9(2) Resale Prices Act 1976.
216. In many franchises, especially for luxury goods, it is expected that the franchisee will provide extensive pre and post sales services to the customer. The nature and manner of the provision of these services will often be laid down in detail by the franchisor. Restrictions of this nature on the franchisee should benefit from Section 18(2). For an example see Clause 5(d) No. 4579 Register of Restrictive Trade Practices - Pronuptia and Youngs (franchise) Ltd., bridal wear; the franchisee shall, "strictly and continuously adhere to the franchisor's rules, regulations and standards as to methods, systems, operating procedures and programmes as specified in the Franchisor's standards of operation in the conduct of the Franchisee's business as the same may be published by the Franchisor from time to time."

217. [1984] I.C.R. 12.
218. *ibid.*, at p. 51D.
219. *ibid.*
220. See, Automatic Telephone and Electric Co. Ltd. (1964) L.R. 5 R.P. 1; (1965) L.R. 5 R.P. 135 (C.A.); Ravenseft Properties v. Director General of Fair Trading [1977] 1 All E.R. 47 (Q.B.D.); and see DGFT Annual Report (1976) at p. 36.
221. This conforms to the view in the USA, see e.g., Principe v. McDonalds Corp. 631 F. 2d. 303 (4th Cir. 1980).
222. DGFT Annual Report (1983) p. 107.
223. See MMC General Report into Full Line Forcing and Tie-in Sales (1980-81) H.C. 212.
224. See MMC Report in the supply of ice cream and water ices H.C. The MMC were critical of the suppliers practice of requiring franchisees who operated mobile vans not to stock or sell any goods other than the brands specified in the franchise agreement nor to be concerned in certain specified areas in any other mobile business in the relevant goods. The Secretary of State negotiated undertakings with the suppliers which removed exclusive purchase requirements, tying requirements and bans on supplying competing products. Given the highly concentrated nature of the market these practices were found to create entry barriers for new suppliers, create expansion barriers for existing suppliers, and, limit consumer choice. See the Parliamentary Statement of the Minister on the report at H.C. Deb. (1981-82) 23, C. 105-108 reprinted in DGFT Annual Report (1982) pp. 73-76.
225. No. 4578 Register of Restrictive Trading Practices (1982).
226. For literature on selective distribution see: Chard, The Economics of the Application of Article 85 to Selective Distribution Systems (1982) E.L. Rev. 83; Sharpe, Refusals to Supply, (1983) 99 L.Q.R. 96; Thirteenth Commission Competition Report (1983) pp. 38-42 paras. 33-39.
227. Grohe O.J. 1985 L9/17 at p. 20 para. 14 (23 Jan. 1985); See also Ideal-Standard O.J. 1985 L20/38 at p. 41 para. 14 (24 Jan. 1985); Metro (Case 26/76) [1978] C.M.L.R. 1 [1977] E.C.R. 1875; L'Oreal (Case 31/80) [1981] 2 C.M.L.R. 235 [1980] E.C.R. 3775; Salonia [1981] E.C.R. 1563.
228. BMW [1975] 1 C.M.L.R. D44 (Commission decision) noted, Vajda, Selective Distribution in the European Community (1979) J.W.T.L. 409
229. *ibid.*
230. [1977] 1 C.M.L.R. D82.
231. [1984] 2 C.M.L.R. 342 noted by Green, (1984) 2 Journal of Computer Law and Practice 70.

232. As of December 1983 IBM had admitted 777 dealers to its network in Europe - Bull E.C. 4/84 para. 2.1.47.
233. [1984] 2 C.M.L.R. 342 at p. 347 para. 14.
234. *ibid.*, at paras. 16, 17.
235. On this last category see Third Commission Competition Report (1973) at para. 22.
236. Grohe O.J. 1985 L19/17 (23 Jan. 1985); Ideal-Standard O.J. 1985 L20/38 (24 Jan. 1985).
237. Gerofabriek [1977] 1 C.M.L.R. D35.
238. FEDETAB (Cases 209-15, 218/78) [1981] 3 C.M.L.R. 134, [1980] E.C.R. 3125 at paras. 179-185 of the judgment
239. [1984] 2 C.M.L.R. 342.
240. *ibid.*, at p. 347 para. 15.
241. See Tenth Commission Competition Report (1980) p. 35 para. 31(2) - the Commission comment that it is necessary to determine whether the properties of the product require selective distribution and whether, "these objectives have not already been attained by national legislation on the right to take up the occupation of reseller or by conditions of sale in respect of the product in question." See also IBM Personal Computer [1984] 2 C.M.L.R. 342 at p. 347 para. 14 which confirms this point.
242. O.J. 1985 L20/38 (24 Jan. 1985).
243. [1977] 1 C.M.L.R. D82.
244. See e.g. AEG Telefunken v. Commission (Case 107/82) [1983] E.C.R. 3151 at paras. 40-43 and 67-76 of the judgment.
245. Chard, *op. cit.*, at p. 85.
246. L'Oreal (Case 31/80) [1981] 2 C.M.L.R. 235; [1980] E.C.R. 3775 at para. 17 of the judgment. See also AEG Telefunken [1982] 2 C.M.L.R. 386 (Commission decision) noted in Eleventh Commission Competition Report (1981) at pp. 59, 60 paras. 85-87.
247. [1975] 1 C.M.L.R. D44.
248. [1970] C.M.L.R. D49.
249. Guerlain, Rochas, Lanvin, Nina Ricci (Case 253/78 and 1-3/79) (1981) C.M.L.R. 99, [1980] E.C.R. 2337

250. Commentators have suggested that the economic logic of these arguments is strong. Chard, op. cit., at pp. 96-98; Gyselen, Vertical Restraints in the Distribution Process: strength and weakness of the Free Rider Rationale under EEC Competition Law. (1984) C.M.L. Rev. 647. Arguments such as these have found favour with the US Department of Justice Antitrust Division. In Jan. 1985 the Department issued guidelines on non-price vertical restraints in distribution systems which accepted that the need to protect against "free riders" was valid and that territorial restrictions were genuine means of achieving this. Para. 2.5 of the guidelines states: "Certain types of vertical restraints are widely recognised as legal, and are subject to very little antitrust uncertainty. For example, manufacturers may lawfully choose to deal through a limited number of outlets - so called "selective distribution" - and their refusal to sell through other outlets is clearly proper". See, Monsanto Co. v. Spray Rite Service Corp. 104 S. Ct. 1464 (1984). It may be that the European Commission will, in time, adopt an increasingly flexible approach to quantitative limitations as a response to changing USA views and increasing pressure from theorists within the EEC.
251. See Thirteenth Commission Competition Report (1983) pp. 38-40.
252. See e.g. Gerofabriek [1977] 1 C.M.L.R. D35; Deutsche-Philips [1973] C.M.L.R. D41; VBVB - VBBB [1982] 2 C.M.L.R. 344 (Commission decision) aff'd (Cases 43 and 63/82) [1985] 1 C.M.L.R. 27. Recommended resale prices which effectively fix prices are equally within Article 85: Hennessy-Henkel [1981] 1 C.M.L.R. 601.
253. (Case 107/82) [1983] E.C.R. 3757 at para . 42
254. Thirteenth Commission Competition Report (1983) p.39 para. 34.
255. [1975] C.M.L.R. D44.
256. [1976] C.M.L.R. D61. But c.f. Deutsche-Philips [1973] C.M.L.R. D241.
257. See SABA [1976] C.M.L.R. D61 and see Chard op. cit., for some of the economic problems related to the clause.
258. Reg. 123/85/EEC, O.J. 1985 L15/1 (18. Jan. 1985).
259. O.J. 1985 C17/1 (18. Jan. 1985).
260. See generally Fourteenth Commission Competition Report (1984) pp. 42-44.
261. *ibid.*, at p. 44 para. 40; Fiat Bull E.C. 5/84 at p.38
262. MMC Report on Supply of Infant Milk Foods (1976-77) H.C. 319.
263. 27 February 1981 (OFT Report).
264. Sharpe, Refusal to Supply (1983) L.Q.R. 36 at pp. 57-63.
265. MMC Report (1981-82) H.C. 67.
266. *ibid.*, at para. 6.28.
267. *ibid.*, at para. 6.29.

268. Sharpe, op. cit., at p. 58, 59.
269. Thirteenth Commission Competition Report (1983) pp. 39, 40 para. 34.
270. 27 August 1981 (OFT Report).
271. ibid.,
272. ibid., at p. 43 para. 6.22.
273. See generally OECD Report, Refusal to Sell, (1969).
274. See e.g. Garden Cottage Foods v. Milk Marketing Board [1983] 3 W.L.R. 143 (H.L.) damages and/or injunction potentially available for breach of Article 86 to dealer who was refused direct supplies from a monopoly supplier but who was permitted supplies from a designated wholesaler of the supplier. The Milk Marketing Board decided to rationalise its distribution network accordingly refusing to supply 16 of its 20 dealers informing them that henceforward the 16 should seek supplies from the 4 designated wholesalers. The case never reached trial on the merits and was eventually settled out of court for a relatively small sum.
275. DGFT Annual Report (1984) p. 108.
276. See e.g. Apple Computer UK Limited Assurance DGFT Annual Report 1984 p. 107. Apple Computers notified minimum prices to dealers and refused supplies to those who sold, advertised or displayed goods at prices below those communicated to them. The OFT obtained a written assurance from Apple along the following lines: (1) Apple would not seek to incorporate in contracts with dealers clauses establishing minimum prices for the resale of the goods; (2) Apple will not notify prices to dealers understood to be minimum prices; (3) Apple will not refuse to supply dealers or otherwise discriminate against dealers for the reason that the dealer sells, advertises or displays for sale the goods at prices below those recommended; (4) Apple will circulate to its dealers a statement conveying the substance of the assurance and advising them of their freedom to set prices.
277. See Sanderson (27 August 1981) OFT investigation under the Competition Act 1980. Dealers refused supplies complained to the OFT. The latter investigated but found that Sandersons refusal to supply certain dealers was not based upon considerations of resale price maintenance but upon the basis of qualitative (and some quantitative) criteria.
278. MMC Report (1981-82) H.C. 67 at para. 6.29.
279. OFT Report (27 February 1981) at pp. 30, 31 para. 7.21.
280. See MMC General Report, Refusal to Supply Cmnd. 4372 (1970) at para. 33 - dominance over an important raw material expressed to be a matter requiring scrutiny by authorities.
281. (Cases 6,7/73) [1974] 1 C.M.L.R. 309 [1974] E.C.R. 223.
282. Essex County Newspaper Limited OFT investigation (14 July 1983) at p. 39 para. 6.31.

CHAPTER 11



TERMS AND CONDITIONS OF TRADE

A. INTRODUCTION

In this Chapter the following will be discussed:

- Section B: Legal framework. Analysis of application of EEC and UK laws to standard form contracts and unfair terms and conditions imposed by suppliers.
- Section C: Codes of Practice. Analysis of attempts by industries at self-regulation through Codes of Practice and Codes of Ethics.
- Section D: Exclusion, limitation of liability and other financial penalty clauses. Analysis of the use of exclusion and other clauses primarily in standard form contracts. Consideration of: death and personal injury exclusion clauses, exclusion clauses, limitation of liability clauses, indemnity clauses, fixed liability clauses, surcharges on overdue accounts, non-exclusion clauses, liens and transfer of title clauses, redemption and early termination of contract clauses.
- Section E: Credit and other terms of payment. Analysis of credit terms, credit control, credit scoring systems.
- Section F: Terms leading to market division. Analysis of market sharing, quotas, geographical market sharing, mutual assistance clauses, permissible quota schemes and geographical schemes in UK law.
- Section G: Sale of Assets Agreements and non competition clauses. Analysis of clauses and covenants permitted in sale of assets and shares agreements.
- Section H: Premises and Trading Methods. Analysis of restrictions imposed upon association members or upon dealers by suppliers concerning the premises from which trade is conducted and general methods of trade.
- Section I: Staffing restrictions. Analysis of restrictions accepted in respect of employees, consideration of exemptions under UK law.
- Section J: Advertising and trade fairs. Analysis of different types of advertising restrictions, methods of funding joint-advertising, trade fairs and restrictive rules governing such fairs.

- Section K: Standards, Quality Control and Descriptions. Analysis of attempts by firms to harmonise contract terminology and descriptions.
- Section L: Customer and end-user restrictions. Analysis of clauses imposing restrictions on customers to whom goods may be supplied and on uses of products once in the hands of customers. Refusal to deal are also considered.
- Section M: Tying Clauses. Analysis of clauses requiring customers to take supplemental goods or services in addition to the main product or service.

B. LEGAL FRAMEWORK

I. EEC Law: Collective Setting of terms and conditions

Article 85(1)(a) prohibits agreements, trade association decisions and concerted practices which, inter alia, directly or indirectly fix trading conditions. The Commission and Court of Justice recognise that for some products price might not be the most important element of competition; the terms and conditions under which the goods or services are supplied may be equally, or even more, important to the purchaser. Agreements on the application of standard terms are therefore prime violations of Article 85(1) EEC.¹ It makes no difference that parties do not agree on the full range of terms and conditions.² An agreement between the members of Trade Association X to supply on standard terms of credit is as restrictive as an agreement to supply on a wider range of standard terms. Trade association standard form contracts recommended for use by members should thus be notified to the Commission. Where the standardisation of terms extends to matters the Commission considers important then the possibility of exemption is remote. An important term is any the consumer might consider relevant in making a selection between sellers. Thus clauses concerning credit, payment periods, discounts, warranties and guarantees, exclusion and limitation of liability, and transport etc. will almost always be central to competition. The need to impose "order" on a "chaotic" market is never accepted as a justification by the Commission.³

II. EEC Law: Individual Setting of terms and conditions

The determination of terms and conditions by individual firms is subject to regulation where the firm enjoys a dominant position. A dominant concern acts abusively if it imposes unfair terms on buyers or suppliers who are less powerful than it.⁴ Whether a term is unfair depends upon an economic and factual analysis of the interests of all those concerned. In assessing fairness the interests of third parties and the general public are relevant.⁵ Thus, if a dominant supplier by imposing unfair terms on a dealer requires that customers of the dealer will pay more, or receive fewer after-sales services etc. then the interests of the general public may have been harmed. In Hoffman La Roche v. Commission⁶ the defendant company required purchasers to notify it of any offers by rival suppliers and moreover to allow the defendant company the option of meeting the rivals price before the dealer was permitted to take from the rival. The European Court objected to this clause, inter alia, upon the basis that it permitted Hoffman La Roche to control a rival suppliers selling success. The clause was thus unfair on third parties.

It is no defense that a practice is permitted by national law or even in the national laws of most Member States.⁷ It does not appear to be necessary to show that the dominant concern coerced or forced the other party into accepting unfair terms. This is logical since a small buyer might simply agree to terms imposed by a giant supplier, nonetheless, the simple fact of capitulation does not necessarily imply contentment with the terms.

The Commission has no formal power to prescribe certain terms and conditions; it may only prohibit abuse.⁸ Though, in formal decisions the Commission must give the defendant indications of conduct necessary to cure the abuse.

III. United Kingdom Law: Collective Setting of terms and conditions

(i) Registrability under the RTPA 1976

Standard terms and conditions are invariably organised under the aegis of a trade association. Under the RTPA 1976 trade association agreements are deemed to have been accepted by all the members.⁹ Likewise, recommendations of trade associations, for example concerning the adoption of a standard form contract (SFC) in dealings with customers, are deemed to be complied with by members.¹⁰ The simple effect of the Act is to require the registration of any trade association

recommendation, or any agreement entered by an association which concerns a registrable matter.¹¹ Simply because members may not be bound to follow the recommendation does not exempt it from registration.

The RTPA 1976 catches agreements whether relating to goods or services which concern the terms or conditions on or subject to which goods or designated services are to be supplied or acquired.¹²

In deciding whether a communication from an association is a registrable recommendation the Court must look at all the surrounding circumstances and the general effect of the whole documents. Thus in Association of British Travel Agents (ABTA hereafter)¹³ the issue was whether a clause in a standard agency agreement which stated, "The agent shall use his best endeavours to persuade the customer to accept either the holiday insurance offered by the Operator or some equivalent suitable insurance in order to ensure that the customer is adequately protected in the event of enforced cancellation, curtailment, medical and other expenses", was a registrable recommendation. The OFT contended that the clause was a recommendation when viewed in the context of intensive ABTA advertising designed to encourage members to promote use of the ABTA preferred insurance brand to customers. The RPC disagreed stating that the fact that ABTA had to use salesmanship and promotion techniques to extol the virtues of its favoured insurance indicated that the standard clause was not a recommendation to members. They were free to use the insurance of their choice when advising customers.

(ii) General approach and Section 21(2) RTPA 1976

A good deal of the cases encountered by the OFT concern standard terms and conditions recommended to members by trade and service supply associations.¹⁴ In general, the OFT welcome standard form contracts (SFC's hereafter) as beneficial to both supplier and customer. This is particularly so where comparatively small firms which lack technical and legal expertise are concerned for otherwise contracts may be entered into which are unenforceable at law. The OFT have three broad rules for assessing SFC's:

- (a) The terms should be fair and reasonable to all concerned. This includes not only the parties but also third parties and the general public. The OFT will invariably seek the views of interested third parties and their representative trade associations. Thus, for example, SFC's including clauses declared

void under the Unfair Contract Terms Act 1977 are never suitable for Section 21(2) dispensation.

- (b) The terms should not be likely to mislead users. Thus goods should not be described as "free gifts" if the purchased article is increased in price or decreased in quality as a result of the free gift offer. Furthermore, the OFT often object to exclusion or limitation of liability clauses which are hidden amongst small print or whose meaning is obfuscated by unnecessarily complex language.
- (c) The SFC must not unnecessarily exclude variations to meet special circumstances and requirements. If suppliers refuse to modify contracts to embrace a purchaser's special needs this will militate against Section 21(2) dispensation. In general mandatory standard terms and conditions will not, for this reason, receive Section 21(2) dispensation.

Essentially, the benefits to customers of having standard terms and conditions is balanced against the detriments to customers of not being able to negotiate individually with the supplier and thereby secure more favourable terms than those likely to result from the restrictions imposed upon them. The OFT examine SFC's on a clause by clause basis. They are happy to discuss draft SFC's with trade associations and other parties upon an informal basis.

(iii) Fair, reasonable terms: Unfair Contract Terms Act 1977

In assessing the fairness or reasonableness of SFC's the OFT bear in mind the strictures of the Unfair Contract Terms Act 1977 (UCTA 1977 hereafter). Thus a contract clause that is either void or "unreasonable" according to that Act must by definition be significant for Section 21(2) purposes. Accordingly a SFC incorporating such a term will be inappropriate for dispensation from reference to the RPC. Trade association personnel may thus bear in mind the guidelines in the UCTA 1977 as to the meaning of reasonableness.¹⁵ These may be summarised as following:

- (a) Is there roughly equal bargaining strength as between the parties? Where a trade association recommends adoption of a SFC to members for use in dealings with individual customers then inequality exists since the customer faces the collective body of suppliers. Where suppliers and buyers respective associations have jointly negotiated

a SFC then a presumption that it is reasonable arises.¹⁶

- (b) Does the customer have alternative sources of supply? If a customer accepts use of a SFC from a supplier whose trade association account for, say, only 35% of all suppliers, this will suggest reasonableness. The customer could, had he objected to the SFC, have sought supplies from a supplier willing to negotiate individual terms. Conversely, if the SFC is used by 80% of all suppliers then the availability of goods or services on other terms is very limited. Similarly, if the purchaser may buy from the same supplier under alternative terms this might suggest a greater degree of reasonableness.¹⁷ The alternative must of course represent a feasible choice.¹⁸
- (c) Does the SFC offer any inducement or compensation to a buyer having to accept an onerous term? If the buyer obtains a price concession or some other favourable terms as quid pro quo for an onerous term then this might suggest reasonableness. Though, if the purchaser has no option but to accept the SFC and the inducement because alternative terms are unavailable then the simple fact of an inducement may be insufficient. The customer may prefer to do without the inducement in return for softened terms and conditions.
- (d) To what extent was the customer aware of a term because, for example, it is customary in the trade, or, because it is based upon an earlier course of dealing between the parties? An onerous term which the buyer is unaware of is unlikely to be reasonable. A SFC should clearly state its terms; clauses which thus state that the purchaser may request in writing a copy of the supplier terms concerning credit and liability for defects should be avoided; if a clause is important to a consumer it should be clearly stated in the SFC. The OFT are always concerned to prevent buyers from being misled. Similarly, terms should not be obfuscated by legal jargon or other terminology likely to confuse non-specialist buyers.
- (e) Insurance. The UCTA 1977 guidelines do not specifically refer to insurance. However it has been recognised as of considerable relevance. A SFC which shifts all of the risk on to the buyer may be reasonable where it has been earlier agreed that the buyer should obtain appropriate insurance thereby freeing the supplier

from the obligation to insure and thereby enabling the supplier to keep his price down. In British Tugowners Association Standard Towage Conditions¹⁹ the OFT gave Section 21(2) dispensation to a SFC which excluded liability on the part of tugboat owners for almost all risks.²⁰ Thus, if in towing a large ship into port the ship collided with another ship or with a jetty due to the negligence of the tug master then the tug owner would not be liable. The patent unreasonableness of the SFC on its face was ameliorated when the insurance position was considered. The protection and indemnity clubs ("P & I Clubs") are mutual assurance organisations which account for 90% of the world's shipping insurance calculated by tonnage. As insurers for both tugowners and shipowners the P & I Clubs had been party to the drafting of the tugowners SFC. The commercial basis of those terms were that hirers of towage services would arrange insurance with the P & I Clubs and the insurance imbalance would be compensated for in the price paid for towage services. Thus, viewed in the overall insurance context the exclusion clauses were reasonable and were accepted by all relevant parties.

It is pertinent to note that the OFT are not bound by UCTA. They simply use that Act as a guide to the meaning of significance in Section 21(2) RTPA 1976. Accordingly, they may use the criteria laid out in UCTA even where technically UCTA 1977 does not apply.²¹

(iv) Approach of Restrictive Practices Court

Until recently SFC's recommended by trade associations to members were treated as single restrictions. This view was based upon the structure of the Act which treats recommendations as single restrictions. Sections 8 and 16 RTPA provide that an association recommendation is deemed to have been accepted by members. Consequently if the RPC, on examination of a SFC, discovered a repugnant clause it would strike down the whole SFC as being a single restriction.²² This approach is patently unrealistic, SFC contain multifarious clauses and repugnant terms can be severed. The sudden abrogation of a SFC would leave a trading vacuum that would be unhelpful to both buyers and sellers.

More recently a different approach has developed. In ABTA²³ the RPC held that restrictions in SFC's had to be assessed both individually and collectively. Thus, when it came to assess a SFC in the context of the "balancing tailpiece" (see Chapter 5 Section C) the Court could

balance the advantages and disadvantages of restrictions in isolation. Thus, whilst certain clauses may fall others may survive. This approach thus enables restrictions in SFC's to be viewed individually. The effect of this judgment may be to encourage the OFT to refer more cases to the RPC.²⁴

IV. United Kingdom Law: Individual Setting of terms and conditions

The OFT may investigate the imposition of onerous or restrictive terms and conditions under the CA 1980. In such cases the party imposing the terms may be investigated, this will be a party with significant economic power. Thus a dominant purchaser may coerce its suppliers to grant it very favourable terms and conditions. More usually a powerful supplier imposes onerous or restrictive terms on purchasers. It is important to note that contract terms may be measured by dual standards. First, they may have restrictive economic consequences; secondly, they may be harsh and unfair.

(i) Restrictive terms and conditions

Contract terms may have restrictive effects at two principal levels. First, at the level of the dominant concern. Secondly at the level of the other party to the agreement. An example of the first possibility would be a clause which required a purchaser to take two different products from the supplier i.e. a tying clause. For example the powerful supplier of a new type of photocopier might require purchasers to also take copying paper. The supplier by its tying of photocopier to paper is creating entry and expansion barriers to rival suppliers of paper for photocopiers. Similarly, a supplier who requires buyers to take 80% of their total requirements from them predominantly forecloses those customers from rival suppliers. An example of the second type of restrictive effect would be where Supplier X grants buyers Y and Z differential terms and conditions. Thus Y might enjoy more favourable credit terms. Since Y and Z are in competition X's discrimination distorts the competitive position between them.

(ii) Harsh and unfair terms and conditions

Harsh and unfair terms may be imposed by a dominant supplier who exploits superior bargaining power by requiring purchasers to accept clauses which benefit the dominant party only. Thus, there might exist

unreasonable exclusion clauses, or unreasonable credit and payment terms. Since the supplier does not discriminate between his buyers he does not influence the competitive position between them. As has been noted above the fairness or reasonableness of terms imposed collectively via SFC's has been a central feature of analysis. However, paradoxically, where unfair terms are unilaterally imposed it is questionable whether the OFT has legal jurisdiction to assess the terms under the CA 1980. The MMC have implied that the "fairness" of contractual terms is a question of the public interest and hence a legitimate question only for the MMC. If this is so then the OFT, being prohibited from assessing the public interest, may not employ a test of unfairness.²⁵ The OFT may only decide whether a company has acted in an anti-competitive manner. It is arguable however that the imposition of unfair terms may have anti-competitive consequences. The dominant party may increase its economic power at the expense of its customers, in so doing it may suppress profits in the buyers market and thereby discourage entry in that market. These hypothetical consequences would exist in extreme situations only. Nonetheless they do suggest that unfair terms and conditions may exert restrictive economic consequences.

One point of interest: If the OFT are precluded from using a fairness test under the CA 1980 then presumably a practice that is unfair but not anti-competitive cannot be referred to the MMC. Accordingly, in theory, although the MMC may use a fairness test as part of the public interest they should never have a case of this sort to hear.

(iii) Fair terms and conditions may have restrictive effects

Simply because contractual terms are fair and reasonable between parties does not mean that they are not restrictive or anti-competitive. If Supplier X gives buyer Y discriminatory and favourable credit terms Y might be perfectly content whereas Z who competes with Y but who receives no equivalent benefit will not be so happy. Thus contractual terms about which both parties are happy may yet be anti-competitive. This has been recognised by the MMC.²⁶

(iv) Summary

The OFT may examine the anti-competitive consequences of contractual terms and conditions under the CA 1980. They may also examine terms about which the parties are happy where an anti-competitive effect is

experienced by third parties. There is considerable doubt as to the legal competence of the OFT to simply assess the fairness or otherwise of contractual clauses.

The MMC may analyse both the competition and public interest consequences of contract terms and conditions. This has led some firms to complain that, since they are prevented from submitting public interest arguments to the OFT they have to wait until the "appeal", the hearing before the MMC, before they can legally present a full case.²⁷

C. CODES OF PRACTICE

Codes of Practices are common throughout British industry. There are particular reasons for this which are discussed below. They exist in other Member States of the EEC though apparently not to the same degree. A "code of practice" can imply a number of things. First, it can imply a guide for safeguarding and promoting the consumers interests. Secondly, it can imply a set of rules used in industry self-regulation which do not necessarily have a bearing upon the consumer. Thirdly, it can be a disguise whereby parties collude beneath a respectable edifice. Competition authorities hence scrutinise Codes of Practice to ensure that they are not being abused. A basic rule is that authorities do not accept that honourable sounding names implies honourable conduct. Thus, in one case the Commission stated of a set of rules entitled Fair Trade Practice Rules, "The mere labelling of an agreement between undertakings as rules against unfair competition does not suffice to remove the agreement from the ambit of Article 85(1) of the EEC Treaty."²⁸ In one classic American case a "Code of Ethics" was accepted as evidence of an illegal price fixing agreement.²⁹ The code, adopted by an association of sugar refiners, the Sugar Institute, provided that: "All discrimination between customers should be abolished. To this end, sugar should be sold only upon prices and terms publicly announced".³⁰ The Supreme Court accepted that this was evidence of a cartel to "sell only upon prices and terms openly announced."³¹ In another case an association sought "to adopt and promulgate a Code of Ethics for the government of the members," and, "to establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable."³² Among these "customs and usages" existed an illegal base point pricing system.³³

Not all codes are wolves in sheep's clothing. Many codes represent legitimate, "voluntary action to end abuses and to foster fair competitive opportunities in the public interest".³⁴

I. EEC Law

Many international organisations are involved in preparing Codes of Conduct for multinationals including amongst others the United Nations (UN), the Organisation for European Co-operation and Development (OECD), the EEC and even the World Council of Churches. To counter these regulatory moves many multinational federations and associations are evolving their own codes as an attempt to pre-empt superimposed alternatives. These codes are antitrust dynamite. They provide a cover for inter firm consensus to develop. The Commission is well aware of the risks they connote and monitor their development with care. It is possible that in future the Commission might order European firms to remain outside of International codes. There is a precedent for this in 1947 when the Federal Trade Commission in the US ordered firms not to belong to the International Electrical Association which had members from all over the world but which limited its operation to those areas of the world where antitrust laws were weakest i.e. outside of the USA and the EEC.

II. United Kingdom Law

The FTA 1973 imposes a duty on the Director General of Fair Trading to encourage trade associations "to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers".³⁶ Associations negotiate the substance of the code with the OFT and then register them. The OFT publish leaflets explaining the Code to consumers. To date there are codes covering such trades as: electrical goods, cars, shoes, package holidays, launderers and dry cleaners, buying by post, funerals, photography, double glazing, furniture.³⁷ Once negotiated and registered these codes obtain Section 21(2) dispensation. Many of the codes cover quite specific activities. Thus the Society of Motor Manufacturers and Traders Code of Practice³⁸ recommends to commercial vehicle manufacturers and operators specifications for the manufacture and fitting of fog lamps for articulated vehicles. The Liverpool Provision Trade Association Limited³⁹ in 1984 issued a code relating to trade customs and a system of arbitration in trade disputes. The

Electronic Organ Distributors Association (which represents the vast majority of procurers, dealers and wholesalers of electronic organs and accessory products) issued a code relating to pre and after-sales services provided for customer through dealers.

In negotiating codes the OFT seek to ensure that certain clauses are included relating to misleading and dishonest advertisements and descriptions, consumers rights concerning cancellation, adequacy of arbitration rights, deposits, exemption and limitation of liability and other unreasonable clauses, refunds, warranty transfers, compensation, guarantees, surcharges, performance times, information, spares, general display and testing facilities.⁴¹ Obviously in their negotiations the OFT are concerned to ensure that these clauses have no restrictive economic consequences. Indeed, they must ensure that this is so before the code can legally benefit from Section 21(2) treatment.

D. EXCLUSION, LIMITATION OF LIABILITY AND OTHER FINANCIAL PENALTY CLAUSES

Exclusion or liability limitation clauses are often methods of allocating risk in a contract. If X and Y agree that X will not be liable for supplying negligent goods, or for providing services in a negligent fashion, or for damage caused by his servants or agents etc. then this is in practice simply a means of contractually imposing an insurance burden on Y. Where X is relieved of the need to insure his costs will be lower and cost savings may be passed on to Y in the price or fee charged. It is hence unrealistic to analyse exclusion clauses without considering the insurance consequences. The same applies to limitation of liability clauses. If X and Y agree that in the event of accident X shall be liable to a maximum as specified in the contract then Y may, after a proper assessment of risk, take adequate insurance cover for damage exceeding the contract maximum. Likewise X may insure up to the contract maximum.

Similar principles apply to automatic liability clauses whereby in the event of breach or accident X's liability will automatically be fixed at a specified sum. The contract might stipulate that in the event of breach X will pay Y £5,000. It matters not that Y's damages may be only £600 or alternatively as much as £20,000.

I. EEC Law

(i) Article 86 EEC

Article 86(a) prohibits the imposition of "unfair trading terms" by dominant suppliers. When will exclusion or limitation clauses be "unfair"? There is a dearth of case law on the subject. Presumably it would be unfair where the dominant supplier shifts the risk to the purchaser but makes no compensating concessions in the form of lower prices. It might be argued that since the supplier is effectively charging the buyer for a cost component not borne by the supplier then that is abuse. In a competitive market the supplier would be forced to pass over cost savings to purchasers. The Commission in Eurofirma⁴² have categorised as an abuse of dominance the attempts by a dominant buyer to extract something for nothing. Thus, where Eurofirma, the largest EEC buyer of railway rolling stock, required as a condition of contract that it be given free of charge unlimited use of all relevant patents the Commission stated that this would represent an abuse of dominance. Might not a dominant supplier who charges for a cost component not borne also be extracting something for nothing and therefore abusing its position?

(ii) Article 85 EEC

Since exclusion and limitation clauses may have a bearing upon product or service price any attempts by parties to collectively determine exclusion and other analogous clauses will almost certainly fall within Article 85(1). Where the clause exists as a result of negotiation of SFC's between both buyer and seller representatives or trade associations then exemption may lie under Article 85(3). First, by clearly dividing insurance duties between seller and buyer the agreement might help parties avoid unnecessary double insurance, i.e. both sides paying insurance premiums to cover the same risks. Secondly, by firmly shifting risk to one side the possibility of expensive litigation to determine fault and, a fortiori, apportion insurance responsibility is avoided. Thirdly, where cost savings are made and are passed on then consumers may enjoy a fair share of the resulting benefits.

II. United Kingdom Law

(i) Clauses imposed by individual firm: CA 1980

There are no cases to date where the OFT or MMC has investigated exclusion or other related clauses. Indeed, since the imposition of such a clause may be unfair rather than anti-competitive it is hard to see that the OFT has competence to investigate such clauses under the CA 1980. An anti-competitive effect might arise where X a dominant supplier imposes upon buyers terms and conditions whereby the obligation to insure rests with the dominant supplier.⁴³ A particular customer may prefer or need to obtain his own insurance (he may be able to obtain low premium rates or may have special needs) but is required to pay the suppliers usual price which includes an element of insurance. Such a customer is forced to pay a double burden and, vis-a-vis competitors who rely exclusively upon the suppliers insurance, is placed at a competitive disadvantage. In such a case the refusal to negotiate individual terms with a supplier may be anti-competitive. Such a refusal might even be viewed as a form of tying practice whereby the buyer is bound to accept the suppliers insurance cover with his products or services.⁴⁴

Buyers faced with exclusion or other clauses limiting or restricting the suppliers liability which they consider unreasonable may consider challenging the clause under the Unfair Contract Terms Act 1977. Such action of course is not a competition law action.

(ii) Collectively Imposed Clauses: RTPA 1976

A recurrent feature of SFC's drafted by trade associations are clauses providing for contractual liability for loss or damage. Each clause is examined on its merits and having regard to the general economic and legal context. Factors relevant to analysis are those discussed above in Section B of this chapter, in particular the Unfair Contract Terms Act 1977 (UCTA 1977). The following are examples of commonly recurring clauses together with some relevant criteria for assessment:

- (a) Liability for death or personal injury: A clause in a SFC (or indeed in an individual agreement) exempting one party from liability for death or personal injury arising out of that party's negligence is void and unlawful in general law.⁴⁵ Consequently, the OFT will not grant Section 21(2) dispensation for a SFC

including such a clause. The Tugowners Association in their 1974 towage conditions sought to exclude liability, "... for any personal injury or loss of life howsoever and wheresoever caused including personal injury or loss of life of the master and/or crew of and/or any person on board the tug or tender". Before Section 21(2) dispensation could be granted in 1984 this clause had to be deleted from the SFC.⁴⁶

- (b) Exclusion clauses: SFC's which provide for unqualified acceptance of liability are rare and generally impracticable. Where the more common converse applies, unqualified exclusion of liability the OFT usually consider such exclusion as unreasonable, harmful to competition and inappropriate for dispensation under Section 21(2). This is not an absolute rule. As stated above clauses providing for unqualified exclusion have been dealt with under Section 21(2). Though these have invariably been where the relevant SFC has been drafted by all sides of the industry jointly and where the exclusion clauses operate to shift risk simply as a means of allocating insurance responsibilities.

Where a SFC is used by sellers in dealings with ultimate consumers it might follow that it is unreasonable to preclude liability since it is unreasonable to expect the man on the street to obtain specific insurance every time he makes a purchase from a shop.

In assessing exclusion clauses the OFT consider a number of factors. First, the relative bargaining power of the parties is pertinent. Where a sellers trade association recommends use of a SFC to members in their dealings with customers and the latter are precluded from negotiating terms and conditions individually then the OFT will probably consider the exclusion unreasonable and incompatible with Section 21(2) treatment. Where the buyers are not a homogeneous category so that the possibility for them to combine and thereby jointly negotiate fairer terms is remote then, again, the OFT are more critical. For example the product might be sulphuric acid, or ball bearings. Both products are used by a wide range of different manufacturer/buyer. These buyers would not naturally meet under one trade association roof so that the possibility of a buyers association arising is less probable. Moreover, simply because a supplier trade association negotiates

with, or obtains the acquiescence of, a buyer association with respect to the use of a SFC does not automatically indicate reasonableness of the clauses in the SFC though it might encourage that conclusion. It is of course possible that there is gross inequality of bargaining power as between the associations. The sellers association might represent 100% of the sellers in the market whereas the buyers association might account for only 20% of the buyers. Relative bargaining power is hence not an absolute criteria.⁴⁷

A second important factor is the undesirability of making a buyer or user pay for double insurance. If the SFC used by the seller provides for insurance by the seller (e.g. there is a clause whereby the seller accepts liability without limit) then the buyer must accept that clause; the cost of the sellers insurance premiums will have been included in the price. However, the buyer may well already have adequate insurance cover so has no need for additional cover provided by the seller. This is quite often the case with respect to carriage and storage services for example. If the buyer is unable to negotiate a variation to the SFC he will be forced to bear a double insurance burden. In such circumstances the OFT might consider the extent of the double burden and whether it is reasonable for sellers to allow negotiated variations to the SFC. The OFT might be unwilling to seek Section 21(2) dispensation where a SFC does not offer several options as to acceptance of liability depending on the insurance required by the buyer and the charge to be made for the service.⁴⁸

As should be clear from the above much will depend upon whether the buyer is an ordinary "High Street" consumer or is a trade purchaser.

- (c) Limitation of liability: Similar principles apply to clauses whereby one party (usually the supplier) contractually limits liability in the event of breach of contract or negligence to a specified sum. Such clauses may simply be means of allocating risk between the parties and hence insurance burdens. In practice such clauses are more acceptable than absolute exclusion clauses.⁴⁹ Limitation clauses are often viewed as a compromise to absolute exclusion clauses since they may reflect a reasonable balance between the parties as to the risks each party should cover.

In determining whether limitation clauses are reasonable reference may be made to Section 11(4) UCTA 1977 which highlights two factors as relevant to this analysis: (a) the resources the party imposing the clause could be expected to have access to for the purposes of meeting the liability should it arise; and (b) the extent to which it was open for that party to cover himself by insurance.

- (d) Indemnity Clauses: A SFC incorporating a clause whereby the buyer is required to indemnify the seller may be unreasonable and inappropriate to Section 21(2) treatment. Indemnity clauses are subject to the test of reasonableness in the UCTA 1977.⁵⁰ The OFT adopt a similar criteria of evaluation. Such clauses may come in various guises. The buyer may be contractually required to indemnify the seller in respect of the latter's liability for negligence or breach of contract. The seller's liability might arise in respect of the buyer directly or vicariously or in respect of a third party e.g. a customer of the buyer. The RPC apparently takes a strict line with such clauses. In British Bottle Association's Agreement⁵¹ the following was stated:

"There is, however, one of the ancillary restrictions which we must briefly mention. It is contained in the conditions of sale of the association. It is headed 'Non liability for Third Party Claims'. It provides, in effect, that a contractual clause is to be inserted in connection with all sales of glass bottles, whereby the purchaser agrees that the member shall not be liable for any claims for injury or damage sustained by the purchaser, his servants or agents, after the bottles have been delivered, and, further, that the purchaser shall indemnify the manufacturer against claims for loss, injury or damage sustained by a third party after delivery of the bottles. This means that the purchaser is left to bear the risk of any injury or damage resulting to the purchaser himself or to any third party as a result of the manufacturers having sold defective bottles even though the defect arises from the manufacturer's own negligence. It was explained on behalf of the association that this clause was introduced in order to ensure uniformity of conditions of sale, that it is the sort of matter which would reasonably be covered by insurance, that in fact the clause has never been used to defeat a claim by a purchaser, and that it was intended as a safeguard against unfounded claims. No purchaser who gave evidence and who was asked the question, was aware of the existence of this clause as a part of his contract for the purchase of bottles. We would only say this: we would have had no hesitation whatever in declaring this restriction to be against the public interest, even if all the other restrictions had been in the public interest."

Indemnity clauses may thus be unacceptable. They have the effect of making one party to the contract the other party's insurer. Why should a buyer be financially responsible for the seller's default? SFC's which contain clauses which simply make it clear that the party responsible for the liability shall indemnify the party who actually "pays up" will generally be suitable for Section 21(2) treatment. Thus, if a retailer pays a consumer £500 compensation on a defective product a clause requiring the manufacturer who produced the defective product to compensate the retailer may be acceptable. Where parties using a SFC operate in a trade or market which is subject to statutory regulations (e.g. health regulations) then clauses requiring parties responsible for breaching their statutory duty to indemnify parties who were actually made liable for that breach may be reasonable. For example, if a subcontractor employs materials which breach health regulations and accordingly is made liable for such breach then the main contractor who supplied the subcontractor with the offending materials may reasonably be required to indemnify the subcontractor.⁵²

- (e) Fixed liability and liquidated damages clauses: The OFT have experienced some difficulty with SFC's providing for liability to be predetermined in the event of breach of duty.⁵³ Such clauses are quite common in services contracts, frequently they are connected with contracts of bailment with the bailee made liable for a fixed sum on proof of negligence or breach of contract.⁵⁴ Thus if an employee of a bailee carriage and storage company crashes his lorry or turns off a cold storage plant or allows thieves to enter a warehouse then the bailee's liability is fixed. Usually the bailor imposes the SFC recommended for use by his trade association. The justification is that if the extent of liability is predetermined parties may organise insurance accordingly. One of the OFT's objections to such clauses may be that a fixed sum is artificial and invariably unrepresentative of the true quantum of damage in a given case; the fixed sum may be greater than the damage actually incurred by the bailor. The relative bargaining power of bailee and bailor will be relevant here. Also, the extent to which an accurate pre-estimate of loss may be made will be of significance; if the amount of loss suffered by the bailor can be

reasonably accurately pre determined it may well be fair to set a contractual figure for that loss on proof of breach of duty.

In other contexts the OFT have objected to SFC's providing for fixed compensation fees to be paid to a provider of services in the event of cancellation by the user. The OFT do not object to cancellation fees but prefer the amount to be a matter for individual negotiation between provider of service and user. Where cancellation is a real risk then cancellation fees may be an important factor in a clients choice of which provider of services to hire. If all providers quote identical fees an important element of competition between the providers has been nullified.⁵⁵

The preferred OFT position is that damages should not be pre-set in SFC's and should be the subject of negotiation in each case. This might necessitate the incorporation of a negotiation of damages procedure into a SFC or that recourse to an independent arbitrator be made possible. However, the OFT appreciate that fixed liability clauses are often reasonable as means of avoiding lengthy negotiation or arbitration disputes and as means of apportioning risk and hence insurance burdens.

Fixed liability clauses which have effect as a penalty clause e.g. if in a contract to do work worth £50 the penalty for breach is £1,000,000,⁵⁶ will not be suitable for Section 21(2) treatment. This is no more than the common law position which renders penalty clauses unenforceable.

- (f) Surcharges on Overdue accounts: SFC's sometimes provide for surcharges on overdue accounts. Often specific rates of interest are specified. In such cases the OFT may require the party imposing the clause to justify the level of the interest rate by reference to losses or additional expenses borne by that party. Where the surcharge bears a reasonable relationship to the pre-estimate of loss such clauses are usually acceptable. Section 21(2) dispensation will not be accorded where a surcharge includes an element of penalty.

These surcharges should not be confused with discounts given by suppliers to buyers in respect of early payment of debts. Thus for example many suppliers grant retailers a discount of 2½% for payment within one month and an additional 2½% (i.e. 5%) for payment

within seven days.⁵⁸ Thus a buyer paying for goods after one month has to pay the list price, he is disadvantaged vis-a-vis early payers. It would be absurd to describe this as a penalty surcharge however. Any buyer may obtain the discount by early payment and, furthermore, the discount is cost-justified by reference to saving earned by the supplier in being paid early.

- (g) Non-Exclusion clauses: Some trade association codes of practice recommend that members refrain from excluding their liability. Such clauses are generally suitable for Section 21(2) treatment. Though, it is possible that they exert a small effect on competition. Under normal circumstances suppliers might lawfully exclude liability, others might not. Thus, whether liability is excluded may be a factor in the customers choice of supplier and hence an element of competition. However, the OFT usually consider that such clauses are not significant restrictions and are of benefit to consumers.⁵⁹
- (h) Liens, transfer of title: A SFC which contains clauses giving the user of the contract power over the other parties goods may well be unreasonable, particularly where inequality of bargaining power also exists. For example, the SFC may have clauses providing that the plant and materials of a contractor when they are on site become the property of the employer of the contractor. This is a form of instant transfer of property by contract. The SFC may give the employer rights over the property in the event of breach by the contractor of the contract or of any other legal duty causing damage to the employer or in the event of the liquidation of the contractor. Alternatively where a SFC provides that the user of the SFC has a lien over the other parties goods, again, this might prove unacceptable. A lien entitles a person who has done work for another to detain goods in his possession belonging to that other until the charges for the work have been paid. Thus, if an association whose members repair consumers goods, recommends a SFC for its members to use which contains clauses giving the members liens over those goods in situations which are unreasonable, e.g. where the consumer refuses to pay because the repairer has negligently lost the article in question, then the OFT might object.

- (i) Redemption and early termination of contract clauses: In contracts for the provision of services it is not uncommon to find clauses imposing a penalty where a customer prematurely ends the contract by early performance of his side of the bargain. Thus, many Building Societies impose redemption interest charges on borrowers who wish to redeem the amount due to them prior to the end of the period for which the loan was made. In 1982 the OFT informed the Building Societies Association (BSA) that, in the light of complaints they had received, they considered a clause on redemption interest in the BSA model rules to be significant and inappropriate to Section 21(2) treatment.⁶⁰ The relevant clause stated: "Where however such a repayment is made in full or in part is made within 5 years after the date on which the advance was made, the Board may require him to pay in addition, if he has not given 3 month's notice in writing of the intended repayment, a sum not exceeding an amount equal to 3 months interest at the rate applicable to the mortgage at the date of such repayment on the amount of principal so repaid." After due consideration the BSA deleted the clause from the Model Rules and replaced it with the following clause: "How to meet the requirements of S.4(1)(g) of the Building Societies Act 1962 is a matter for each Society to decide - paragraph (g) requires a Society's rules to set out among other things 'the conditions on which a borrower can redeem the amount due from him before the end of the period for which the advance was made.'"

Whilst redemption interest or analogous charges are not per se unreasonable (they may be compensation for the loss of fees earned by the service provider due to the early termination of the contract) the OFT are clearly concerned that competition between providers of such services in the conditions they impose on early termination of contracts should remain healthy.

E. CREDIT AND OTHER TERMS OF PAYMENT

Credit and other terms of payment are important factors in a customers choice of supplier and are hence factors in competition between suppliers. Attempts by suppliers to harmonise credit and payment terms will generally be consider as unacceptable. Where a dominant or economically powerful supplier imposes unduly harsh payment and credit terms upon customers then that supplier may have abused its position. In this section discounts will not be discussed, these have already been examined in Chapter 8.

I. EEC Law

The Commission and European Court have both struck down attempts by parties to jointly fix credit and terms of payment. This is especially so where the agreement is co-ordinated by a trade association and/or where the market is oligopolistic.⁶¹

However joint debt-collection association comprising small and medium-sized undertakings may legitimately undertake joint collection of outstanding debts. The association should only act upon the clear instructions of the creditor.

Thus the association might apply different criteria when collecting debts on behalf of X than it will when acting on behalf of Y. The Commission has made it clear however, in the Co-operation Notice it published in 1968,⁶² that any attempts by an association to fix prices or terms and conditions of trade may infringe Article 85(1) EEC. Thus members of the association should avoid laying down uniform criteria for debt collection. If such uniformity is desired then the association must obtain clearance from the Commission.

The Notice also states that the creation of credit guarantee associations are outside of Article 85 since they do not affect the relationship between supply and demand. There is no reason why other forms of credit co-operation should not also fall outside of Article 85(1) EEC, for example, investment trusts or capital investment companies.

The exchange of data on the solvency of customers is also permissible.⁶³ Associations which collate such information should confine their activities to dissemination of data only, they should avoid recommending to members how they should interpret the information. Where such recommendations exist there may be a concerted practice between members as to the granting of credit facilities. Whereas most informational exchange systems should collect and collate data in anonymous, aggregated form obviously in this instance

individualised data is acceptable. Care must be taken by associations to maintain accurate records. Most Member States have rules on defamation which may render an association liable for wrongfully imputing a crime to a person (thereby implying that he is a bad credit risk). Furthermore, associations should not issue black lists of customers which members should avoid supplying or giving credit to. Black lists which entail collective boycotting or discrimination will represent serious infringements of Article 85(1) EEC.⁶⁴

II. United Kingdom Law

(i) Under the RTPA 1976

The OFT usually scrutinise closely trade association credit systems. They accept that suppliers have a legitimate interest in controlling credit facilities. Bad debts increase costs and have an inflationary effect upon prices.⁶⁵

Since credit terms are generally perceived as being an element of price attempts by manufacturers to agree upon standard credit terms and conditions will be inappropriate for Section 21(2) treatment and may be referred to the RPC for prohibitory orders to be issued.

Credit control systems operated by trade associations may be suitable to Section 21(2) treatment.⁶⁶ Such systems are most useful in markets in which sellers deal with a large number of small buyers in scattered localities and no central credit rating service is available. To be suitable for Section 21(2) treatment credit systems should be: based upon objective criteria; scrupulously accurate; and, not used for anti-competitive purposes.

(a) Criteria should be objective: Associations must ensure that the criteria they adopt for determining how a person fits into a certain rating category (e.g. strong, satisfactory, weak, unsuitable for credit) is objective. As a rule the OFT accept criteria premised upon the financial soundness of the customer but reject subjective criteria based upon such factors as the associations estimation of the customers competence or experience. Some ostensibly objective criteria may have anti-competitive consequences however. Thus the use of "red lining" criteria may bereft a system of Section 21(2) dispensation. "Red lining" is the practice of refusing credit solely on the basis of where the applicant lives or operates from, in effect a no credit line is drawn around what the association considers to be a high risk area for bad debts

(e.g. inner city areas). "Red-lining" may arbitrarily exclude good customers from obtaining credit and it may thereby place them at a competitive disadvantage vis-a-vis their competitors in "better" areas. Moreover "red-lining" might infringe legislation on racial and sex discrimination. Criteria incorporating such factors will almost certainly be "significant" in Section 21(2) RTPA 1976 terms and inappropriate for dispensation from reference to the RPC.

Credit scoring is an objective method of credit analysis which is becoming increasingly popular.⁶⁷ It has been defined as, "... a mathematical method of assessing individual creditworthiness based upon a statistical analysis of a large sample of an equal number of accounts in which the payment history has been good, of accounts where there has been default, and of applications where credit was refused."⁶⁸ The methodology is used mostly in connection with individuals though it also has a commercial use. A well designed credit scoring system may well be unobjectionable in competition terms. However, even well designed systems may have unintended, exclusionary consequences. There will inevitably be some applicants for credit who fail to qualify because they have special characteristics which are not typical of the model used. To counter these cases credit scoring systems should retain a degree of subjectivity or "overriding" i.e. the taking into account of factors or characteristics not included in the credit scoring system in order to accept or reject applicants who score less than the pass mark.⁶⁹

- (b) Criteria should be accurate: credit rating systems may employ criteria based upon the honesty of the customer. Thus in Aberdeen Fish Salesmen's Association⁷⁰ the Association recommended to members that they refuse credit to any person convicted of theft or reset of fish (i.e. the practice of redisplaying for sale old fish). Associations employing such criteria must be extremely accurate. The wrongful listing of a person as a convicted criminal is extremely defamatory and may lay the association bare to substantial damages claims. In this respect associations must consider the Rehabilitation of Offenders Act 1974 which provides that convictions for offences in respect of which the offender has received a sentence not exceeding 30 months imprisonment and where a specified time varying from 5-10 years (depending on sentence) has elapsed since the conviction, shall be treated as spent i.e.

never having taken place. Associations who list as a convicted criminal a person whose sentence is spent may find that their incorrect listing renders them liable to the applicant (Section 4(3)(b) of the Act).

- (c) Systems must not be used for anti-competitive purposes. Credit systems should not operate as cloaks for the standardisation of members terms and conditions. The OFT may be suspicious of a scheme where they consider that private credit rating services are available and adequate for the parties purposes. Trade associations should restrict themselves to the mechanical analysis of credit data, they should avoid advising members on how to construe the data. Members should retain the freedom to supply credit to whomsoever they please irrespective of credit data supplied by the association.⁷¹

Though some degree of standardisation of terms may be justified where designed to protect privacy. In Committee of Scottish Clearing Bankers (CSCB)⁷² the CSCB was concerned with the established custom whereby a banker gives an indication of the respectability and standing of customers if requested to do so by another banker. In the light of this the CSCB drew up a list of banks and similar institutions and agreed that enquiries received from parties on the agreed list could be replied to direct. The list was based on the Bank of England list of Financial Institutions which are regarded as falling within the banking sector with certain additions thereto. Under the agreement status enquiries received from Government Departments would only be replied to with the consent of the customer concerned. This was not considered "significant" for Section 21(2) purposes and was in the customers interests. Standardisation of practice to secure privacy was no obstacle to dispensation under Section 21(2) RTPA 1976.

(ii) Under the CA 1980

Where a dominant person discriminates between his customers as regards the credit terms he will grant them and where no objective justification accounts for the discrimination then the dominant party may be acting anti-competitively. Such discrimination can influence the competitive inter-relationship between those with whom the dominant party deals. The same applies to any other terms of payment. Such discrimination may be closely akin to price discrimination (examined in Chapter 8).

F. TERMS LEADING TO MARKET DIVISION

It is axiomatic in competition law that market sharing is unacceptable. Division of market may be achieved via numerous techniques, in this section some of those used will be discussed. Market sharing has already been discussed in other chapters. For example Chapter 8 gives examples of cases where price arrangements have been used as means of avoiding competition between parties in each others primary marketing area e.g. agreements not to undercut a competitor on his own patch. Chapter 9 gives examples of exchanges of information which may lead to market division. Chapter 10 examines the problem of market division in distribution networks.

I. EEC Law

Market sharing almost always violates Article 85(1) EEC which prohibits agreements, trade association decisions and concerted practices which:

"(b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply."

(i) Quotas

Agreements whereby parties divide the market according to quotas almost always infringe Article 85(1).⁷³ The agreement still infringes Article 85 if it is not intended to last as, for example, where it relates to a single transaction.⁷⁴ Though, it is acceptable where X and Y conclude an agreement for delivery of a fixed quantity of goods for X to arrange for the goods to be distributed through competitors to Y according to a set formula.⁷⁵ Where a quota scheme is prohibited it need hardly be stated that restrictions designed to facilitate the scheme are also unlawful. Thus equalisation of profits schemes (discussed in Chapter 8) are unlawful; exchange of data between competitors for instance in respect of quantities sold, customers, invoices etc. will also be prohibited. The only types of quota scheme that may be allowed are rationalisation agreements between firms in "crisis" industries which are designed to reduce over-capacity in an orderly manner. These joint venture rationalisation agreements are examined in Chapter 12.

(ii) Geographical

Parties who seek to divide markets by geographical territory infringe Article 85(1).⁷⁶ Usually division occurs along national boundaries. Such is anathema to all that the EEC holds true.⁷⁷ Though

it is equally unlawful where the agreements defines territories that are unrelated to national borders. Market sharing may be achieved in numerous ways. Thus an agreement between X and Y not to license third parties in each others territory is a breach of Article 85(1).⁷⁸

Agreements between X, Y and Z not to "disturb" the prevailing price in each parties primary marketing area are also unlawful; an agreement not to "dump" products in each others main areas where the definition of dumping is any price lower than the market leader in that territory is also unlawful.⁷⁹

(iii) Mutual assistance clauses

Agreements which tend to encourage maintenance of the status quo during periods when fluctuation in market share might be expected will infringe Article 85(1). In C.R.A.M. v. Commission⁸⁰ the European Court examined mutual assistance clauses. These provide that the parties to the agreement shall supply each other in the event of serious technical or other disruptions resulting in significant loss of production. Where such a clause is designed to prevent parties from benefiting from difficulties encountered by rivals this tends to maintain the status quo artificially. Moreover, the clause entails parties holding back supplies in order to meet competitors calls for assistance should they arise. Both the Advocate General and the Court of Justice agreed with the Commission that such clauses were unlawful.⁸¹

Market sharing of territories outside of the EEC are unaffected by EEC rules unless they have some "spin-off" effect on the EEC market. Though such agreements may of course be caught by national or international laws prevailing elsewhere. Agreements not to sell into the EEC market will be subject to EEC law, they reduce the level of competitive activity by their non-participation.⁸²

Market sharing by means of competitors allocating specific customers to each other will be unlawful with the chances of exemption under Article 85(3) remote.⁸³

Agreements whereby X and Y undertake to concentrate their efforts on different products (i.e. specialisation agreements) and hence share products between them may well be suitable for Article 85(3) exemption. See Chapter 12 for details.

II. United Kingdom Law

(i) Under the RTPA 1976: Unacceptable agreements

Agreements between parties to divide markets whether geographically, by quota or by some other device are registrable and will not be suitable for Section 21(2) treatment. They will, almost certainly, be referred to the RPC for a prohibitive order to be made against them wherever the OFT consider that the agreement has been operated in a clandestine fashion or has exerted serious, restrictive consequences.⁸⁴

The RPC has generally adopted an unsympathetic stance to market sharing. Agreements not to market new products without the consent of other parties have been struck down.⁸⁵ Agreements not to poach on each others primary selling areas are also unacceptable.⁸⁶ The RPC has also condemned an agreement between parties not to supply during a specified period of time products in such quantities as would "overload" the market.⁸⁷ In 1977 the Publishers Association, as part of a review of its practices in the light of general competition law, revoked a clause in an agreement whereby publisher members would normally respect an 18 months to 2 years time gap between publication of hardback and softback books with the former being published first. Clearly this restriction was designed to reduce competition between soft and hard-back books. Whilst the RPC was never required to hear the case because the parties abandoned the restriction it appears, prima facie, to hamper consumer choice and to artificially sustain a market in hard-back books.⁸⁸

(ii) Under the RTPA 1976: Acceptable Agreements

It would appear to be established that quota schemes drafted in the form of positive selling or buying obligations are not registrable. Clauses obliging a party to supply to the other a specified amount of a product or obliging a party to purchase a specified amount of a product are terms that may be disregarded when determining registrability. This derives from Section 9(3) RTPA 1976⁸⁹ which provides:

"In determining whether an agreement for the supply of goods ... is an agreement to which this Act applies by virtue of this Part, no account shall be taken of any term which relates exclusively to the goods supplied ... in pursuance of the agreement."

In Cadbury Schweppes Ltd. v. Lyons⁹⁰ CS agreed to purchase 43% of its sales requirements of citrus concentrates from L who was, in

turn, required to supply CS with that amount in priority to other demands. CS and L are both rival producers of concentrate but under the agreement CS was deterred from producing concentrates to the extent of the amounts supplied to it by L. CS had thus limited its output in favour of L. The RPC held that the agreement was one whereby L agreed to supply CS with goods and was hence within the exemption.⁹¹ This conclusion was reached despite acceptance by the Court of the avowedly restrictive purpose and effect of the agreement.⁹² However, the Court stressed that in assessing the exemption no account was to be taken of the surrounding circumstances.⁹³

Despite criticism of this case for opening up a loop-hole in the legislation the principle has been accepted subsequently by the RPC. In Diazo Copying Materials,⁹⁴ the parties concluded a joint venture agreement for the design, manufacture and marketing of a highly specialised new kind of photocopying machine. Under the agreement HTL would manufacture the machine to the order of MSL. Further MSL would market the machine throughout the world exclusively, but, would grant HTL a non-exclusive, non-assignable and non divisible right to make retail sales and other disposals in the United Kingdom. The agreement thus operated a form of geographical market sharing between HTL and MSL. The RPC held that the agreement was for the supply of goods within the meaning of Section 9(3) and that the restriction on sale by HTL outside of the UK related exclusively to the goods supplied so was excluded by Section 9(3) from consideration when considering registrability.⁹⁵

Two other forms of potentially acceptable market sharing may be mentioned. First, specialisation agreements whereby the parties allocate to themselves different products upon which to concentrate development efforts. Secondly, rationalisation agreements whereby parties, by acceptance of strict quotas, reduce capacity in crisis industries. Both types of agreement which are usually in the form of joint ventures are discussed in Chapter 12.

(iii) Competition Act 1980

Agreements outside the RTPA may be within the ambit of the CA 1980. Thus, the Schweppes agreement being outside the scope of the RTPA might now fall for investigation under the CA 1980. Likewise in respect of Diazo Copying Materials.

The CA 1980 might be suitable for attempts by a dominant supplier to foster conscious parallelism and market sharing thereby (though this might

also be a case for the monopoly provisions of the FTA 1973). If X consciously refrains from supplying into Y's primary marketing area in the hope that Y will refrain from breaching X's primary territory then the conduct of X might be anti-competitive. If X's behaviour ultimately leads to an "arrangement" with Y then the CA 1980 loses applicability and the RTPA 1976 takes over.

G. SALE OF ASSETS AGREEMENTS: NON-COMPETITION CLAUSES

When a parent company sells a subsidiary to a rival as a means of exiting the market in which the subsidiary traded their may well be included in the sale agreement a clause preventing the old parent from engaging in any rival business for a fixed period of time and within a fixed geographical area. Usually, such restrictions are immaterial to the old parent who has no intention of re-entering the market. For the purchaser such clauses are material in that they are guarantees that the full commercial value of the business has been properly transferred. The interest of competition authorities lies in ensuring that the old parent is not unduly restricted from possible re-entry to the market. Whilst re-entry might never actually occur there remains a valid interest in ensuring that it is at least a possibility.

I. EEC Law

(i) General framework under Article 85 EEC

Prima facie the mere transfer of a business does not per se restrain competition and therefore is outside the ambit of Article 85 EEC⁹⁶. Contractual commitments given by vendors of assets or shares not to compete with the buyer for a set period of time and in a given geographical territory are regarded as legitimate means of ensuring the performance of the vendor's obligation to transfer the full commercial value of the business since the sale of a business involves the transfer not only of physical assets but also of commercial know-how and clientele.⁹⁷ These obligations thus are guarantors for the buyer that the value of the purchase will not be eroded by competition from the seller.⁹⁸ Non-competition clauses may take different forms including restrictions on the amount of time during which the vendor is precluded from competing with the buyer; restrictions on the

territory the vendor may recompetein;and restrictions on disclosing information obtained during the running of the transferred business.

(ii) Restrictions on time

This is the central restriction in these agreements. The Commission's rule of thumb is that where the transfer of a business also involves the transfer of good-will and know-how, a period of approximately five years is usually acceptable. However, when the sale involves only the transfer of good-will a period of two years is acceptable.⁹⁹

In Reuter-BASF¹⁰⁰ the Commission highlighted four factors as relevant in determining how long the non-competition covenant should last: (a) the nature of the know-how transferred, if the know-how is very complex and the buyer will need a considerable amount of time to reach a point of maximum exploitation then this suggests the need for a lengthy non-competition period; (b) the opportunities for use of the know-how, if the opportunities for exploitation of the know-how are limited the buyer will require a longer period of protection from the vendor in order to reach a point of satisfactory return on the know-how; (c) the extent of the buyer's knowledge, the time needed to maximise exploitation will also depend upon the expertise of the buyer; and, (d), whether the non-competition covenant relates to know-how existing at the date of transfer or new developments based upon or connected to the transferred know-how, a non-competition clause extending to new or further development can be of shorter duration. In Nutricia¹⁰¹ the Commission added a factor that may be seen as discreet from those above, the duration of the non-competition clause may depend upon an assessment of how long the buyer will need to consolidate its hold on its new customers.

The Commission also apply these considerations to exclusive trade mark licenses: X, in the USA grants Y, in Germany, a 10 year exclusive trade mark license. X then transfers his business in the USA to Z, another firm in the USA. The transfer is subject to existing licences. Z wishes to enter the EEC market but is hindered by its inability to use the trademark it purchased from X because of the subsisting license held by Y. The Commission consider that the ten year trademark license represents an unreasonable protection from competition and Y may no longer use the mark.¹⁰²

(iii) Restriction on geography

In respect of geographical extent the non-competition clause must not normally extend beyond those markets in which the seller was active before the sale or in which it may be regarded as a potential competitor on the basis of its relevant and demonstrable commercial activity.¹⁰³

Thus, the buyer may prohibit the seller from re-acquiring his old customers in the areas where he operated prior to the transfer. Where the seller is a small businessman and only possesses facilities in one Member State then a restriction on selling in the national territory may be over broad if it prevents the seller from operating in hitherto unexplored areas. Thus depending on the size of the seller the territorial restriction may be less than the national territory.¹⁰⁴ Conversely, where the seller is a large corporation whose selling area embraced the whole of the EEC the ban may be EEC wide.¹⁰⁵

(iv) Disclosure of Information

In Reuter-BASF¹⁰⁶ the Commission commented, in respect of a covenant on the seller not to disclose the know-how, that in view of the rapid development of the technology it was questionable whether the know-how was sufficiently valuable in economic terms to justify a long non-disclosure covenant. Five years was considered adequate in that case. The length of time non-disclosure may be enforced may depend on the rate of advancement of new technology, protection should presumably last only until such technology becomes standard knowledge in the industry at which point protection should no longer be necessary.

(v) Whether sale amounts to an abuse of dominance under Article 86 EEC

Sale of assets agreements may be challenged on the basis that they increase the purchasers market share to an extent considered to represent an abuse of dominance. Thus, if X purchases assets belonging to Y and; thereby increases its market share from 50% to 68% and additionally prevents Y from re-entering the market for a period of years in a specified area, then X might have abused a dominant position.¹⁰⁷ Such cases will be rare.¹⁰⁸

II. United Kingdom Law

(i) Under the RTPA 1976

Sale of assets agreements may be registrable where two parties accept restrictions. They are not registrable if only the buyer accepts restrictions.

Registrable agreements might arise if a parent company sells a

subsidiary and covenants to the purchaser that it will not compete with the subsidiary for a specific period of time and in a designated area. The subsidiary may covenant not to disclose confidential information about the former parent to the new purchaser, or it may covenant not to expand into areas the old parent is now concentrating on for a fixed period of time. In such a case two persons accept registrable restrictions.

Another example might be where Director X and Director Y each sell their 50% shareholding in XY Co. to a purchaser and both covenant not to compete or have a financial interest (other than a purely disinterested investment) in a competing company for a fixed time period and in a designated area and not to disclose confidential data to competitors of the new owner. Again, two persons (X and Y) accept registrable restrictions.

The OFT rarely find that these agreements contain significant restrictions. Indeed, forty such agreements have received Section 21(2) dispensation since 1980.¹⁰⁹ Often these agreements may be given such dispensation very rapidly (approximately six months). The factors taken into account by the OFT are: (i) whether the sale price contained an element for goodwill, where it does it is reasonable to permit restrictions to be imposed by the buyer as a means of guaranteeing that the full commercial value of the purchase is protected; (ii) whether the non-competition period of time is reasonable, most agreements gaining Section 21(2) dispensation have time periods of between 2 and 5 years (the same as with EEC rules, see above); (iii) whether the non-competition geographical location is reasonable, this will depend upon the reach of the seller's activities prior to the sale. Restrictions on sale in the whole of the United Kingdom are not unreasonable in appropriate circumstances;¹¹⁰ (iv) whether there are unreasonable restrictions on the sellers capacity to use or disclose information, generally speaking restrictions on information should not extend beyond such time as the knowledge enters the public domain.¹¹¹

Geographical restrictions will only be justifiable where they are factually and commercially linked to the sale of the assets in question. Where the nexus is tenuous then the OFT are unlikely to countenance geographical market sharing. Parties must register these agreements, failure renders restrictions in the agreement unenforceable. In Unit Marketing v. Christenson (1984 Unreported) the plaintiff sold certain valuable "bookings" and customer lists to the defendants. As part of the

agreement an informal arrangement about the areas in which the plaintiff and defendants would concentrate their sales efforts in was also arrived at. The agreement was not registered and in a dispute over the consideration to be paid for the bookings and customer lists the question arose whether the agreement was void for want of registration. The Court held that the geographical restriction was, as a question of fact, unconnected to the consideration to be paid by the defendant. Accordingly it was severable and did not taint the remainder of the agreement. Counter-claims for damages however based upon alleged breaches of the territorial restrictions were consequently bound to fail.

The case highlights the importance of registration, this is especially so given that sale of assets agreements incorporating geographical restrictions are invariably suitable for Section 21(2) treatment. Further, it suggests that restrictions that, in commercial reality, are unconnected to the value of the sale may be severable. Indeed, for Section 21(2) purposes unconnected restrictions may well have to be deleted; the justification for their acceptance is that they are necessary to ensure full transfer of the value of the sale. Where this connection does not exist the justification for allowing such restrictions disappears.

(ii) Under the Fair Trading Act 1973

The Secretary of State may refer to the MMC prospective mergers that he considers may conflict with the public interest. Simply because the agreement is registrable under the RTPA 1976 does not deny the MMC jurisdiction in merger cases. Hence powerful purchasers must consider this aspect of the law when considering the restrictions to be imposed upon sellers.

H. PREMISES AND TRADING METHODS

It is now recognised that restrictions upon the style in which, or forum from which, trade is pursued may be restrictive. The ability of traders to experiment with new methods of presentation or marketing is now viewed as a central element in competition. Restrictions upon the premises in which business is conducted, its size and geographical position are carefully scrutinised as are restrictions on trading method.

Thus if suppliers seek to prevent distribution of their goods through discount warehouses , cash and carry stores or multiple function retailers then serious distortions of competition might arise.¹¹²

I. EEC Law

Premises and trading methods restriction appear most often in four contexts. First, in the criteria adopted by suppliers in selecting dealers. Secondly, in the obligations imposed by suppliers on dealers. Thirdly in recommendations made by trade associations to members. Fourthly, where firms share physical facilities for warehousing or other purposes.

(i) Selection of dealers by suppliers

This subject has been examined in Chapter 10 Section L on distribution to which reference may be made. Essentially suppliers should select dealers on objective qualitative criteria and not subjective quantitative criteria. Moreover, these objective, qualitative criteria should pertain to technical qualifications and/or the suitability of trading premises. Without undertaking detailed analysis it is clear that a supplier may select dealers upon the basis of the suitability of their premises to the standard of marketing required for his goods. However suppliers must not, through their criteria, exclude new forms of selling which satisfy the qualitative standards set by the supplier but who might adopt innovative methods which the supplier dislikes. In AEG-Telefunken v. Commission¹¹³ the European Court stated:

"Such a practice must be considered unlawful where the manufacture, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refuses to approve distributors who satisfy the qualitative criteria of the system."

Thus a supplier who sets his criteria so as to avoid discount warehouses, department stores, multi-purpose retail outlets etc. may infringe Article 85(1) EEC. Criteria seeking this objective may for instance provide that authorised dealers must have floor space of only up to a certain amount thereby excluding other outlets, such as discount warehouses, which will probably have a larger floor space.

(ii) Obligations imposed by suppliers on dealers

As noted above suppliers may, within limits, employ premises and method of trading criteria to select appropriate dealers. Once admitted to a suppliers network the latter may impose certain trading

method restrictions upon the dealer. These are generally considered to be acceptable restrictions designed to ensure adequate pre and post-sales servicing and to protect the suppliers reputation. Indeed, it is expressly lawful, under the bloc exemptions on exclusive dealing and purchasing,¹¹⁴ to require dealers to "take measures for promotion of sales" which include advertising, maintenance of sales networks or stocks of goods, provision of customer and guarantee services. However, the caveat should be added that where these restrictions are designed to restrict competition by excluding new and innovative methods of trading then the bloc exemption does not apply.¹¹⁵

(iii) Recommendations made by trade associations to members

Trade associations which seek to regulate the premises or methods of trading of members will violate Article 85(1). Thus, in Stoves and Heaters¹¹⁶ the Commission condemned a Dutch trade association whose members were required inter alia to sell the products only on premises belonging to them. Membership of the association was limited to persons owning the retail outlet. Moreover, members were restricted in their ability to trade with non-members. The Commission objected largely on the grounds that the rules created entry barriers to the market since new retailers had to purchase premises (rather than lease) as a pre-condition of membership to the association and membership of the association was critical to commercial viability (its members covered in excess of 90% of the trade in certain heating appliances in Holland).

Trade associations which condition membership upon the adequacy of the traders premises may violate Article 85 especially where membership of the association confers benefits which make membership a valuable commercial asset as in Stoves and Heaters supra. Thus, for example, an association might impose requirements of ownership, floor space, stock room capacity, display facilities etc. The association might restrict membership to single line retailers and exclude multi product line department stores. Where membership is at a premium, restrictive entry rules based upon premises or method of trading may operate as entry barriers to new firms particularly where compliance with the membership requirements involves expense.

(iv) Joint use of physical facilities (storage, warehousing etc.)

The Commission have stated, in a non-binding notice, that the joint use of storage facilities or of transport equipment does not infringe Article 85(1)¹¹⁷. Such co-operation is confined to organisation and

technical arrangements for the use of the facilities or equipment. The participating undertakings should, however, bear the utilization costs themselves. Moreover, the agreement should not be used as a front for other agreements. Agreements between small and medium sized enterprises are intended as principal beneficiaries of this Commission Notice. Where large firms who can afford their own facilities co-operate the Commission may be more suspicious.

In conducting joint co-operation the operation rules must not be restrictive. Thus, for example, if X, Y and Z jointly own warehousing and storage facilities at an overcrowded port they must ensure that the rules for determining space allocation during peak periods and other times of excessive demand are fair as between the parties and do not benefit one party to the others competitive disadvantage.

II. United Kingdom Law

United Kingdom law may be assessed in the same way as EEC law.

(i) Selection of dealers by suppliers

The OFT and MMC have adopted a position on selective distribution similar to that of the Commission. Hence suppliers may not exclude from their networks dealers who satisfy the qualitative criteria but who sell through discount warehouses or department stores etc.¹¹⁸ The principle is that selective distribution networks should not be used as entry or expansion barriers to dealers using innovative and modern channels of distribution.

(ii) Obligations imposed by suppliers on dealers

The RTPA 1976 requires the registration of agreements concerning, "the areas or places in or from which, goods are to be supplied or acquired ..."¹¹⁹ It is arguable that restrictions on premises constitute restrictions on the places from which goods are to be supplied. "Places" can imply a geographical place (as in an area) or a physical place (as in a building). The latter interpretation seems reasonable given that the provision also expressly covers geographical area and hence "places" may be assumed to imply something else.¹²⁰ Thus, where a supplier requires a dealer to provide certain physical facilities, or a certain amount or type of display structure etc. this may amount to a registrable agreement. Where services are concerned Section 11(2)(d) (restrictions on the "form or manner" in which services are to be made available, supplied or

obtained) might be relevant. Though for the RTPA to apply both the supplier and dealer must accept registrable restrictions. Furthermore, they must both accept restrictions concerning services or goods. Thus, if a supplier accepted restrictions on the goods to be supplied and the dealer accepted premises restrictions relating to the services he provided in connection with goods then the agreement would not be registrable.

(iii) Recommendations made by trade associations to members

In ABTA¹²¹ the RPC was required to examine a number of restrictions imposed by the association upon tour operator and travel agent members. These included the following:

- (a) not to use premises for any other purpose than for organising and selling tours or holidays or other travel arrangements;
- (b) not to carry on business as a travel agent at any premises unless a legal estate in those premises is vested in the member or spouse or parent company;
- (c) not to carry on business as a travel agent in premises which do not meet the associations standards;
- (d) Not to carry on business as a travel agent from department stores or hotels in units which are totally isolated from other activities conducted thereat without the permission of the association.

Before the RPC, ABTA argued that these restrictions were in the public interest. They ensured adequate standards of accommodation were maintained so that the customer received a proper and efficient service. Further, adequacy of commercial accommodation was essential to the good name and reputation of ABTA. The RPC were unimpressed. Two main policy objections were raised against premises restraints. First, they create barriers to entry to new firms with new forms of competition and innovation which could benefit the public: "They impose a rigid structure on the industry which is not responsive to customer demand so that there is a danger that ... the industry will become fossilized".¹²² Secondly, premises restrictions deny the consumer choices between different qualities of services. The RPC made the important point that consumers may prefer lower quality services at cheaper prices rather than higher quality services at higher prices.¹²³ This point is of relevance also to trade association recommendations about product standardisation.

In view of this decision trade associations should be cautious about

attempting to set any premises restrictions. Certainly rules requiring members to own premises, or rules preventing use of premises for multiple purposes will not be treated as insignificant so as to warrant Section 21(2) treatment. Hence, they will have to be defended before the RPC if they are to be retained. Less extreme restraints for example concerning adequacy of fixtures and fittings may perhaps in appropriate cases be suitable for Section 21(2) treatment.

(iv) Joint use of physical facilities (storage, warehousing etc.)

The joint use of physical facilities such as storage or warehousing is probably not registrable provided parties accept no restrictions as to the use of those facilities. If usage restrictions are imposed e.g. as to percentage of total floor or shelf space allotted to each party then there might be a restriction under Section 11(2)(e) RTPA 1976 i.e. restriction on places in or from which services are to be made available. In principle there are no reasons why such an agreement should not normally benefit from Section 21(2) treatment.

I. STAFFING RESTRICTIONS

Restrictions upon qualifications and experience of staff may well be justified as necessary to protect the reputation of the supplier or to safeguard the consumer against misleading or technically unsound advice. Conversely, over restrictive staffing requirement may impose entry barriers to new entrants and may stifle new and innovative methods of trading.

I. EEC Law

Staffing restrictions usually appear, as do premises restrictions discussed in Section H above, in the context of the criteria used by suppliers to select dealers and in the actual contractual regulation of a dealers business once he is appointed to the network. It is pertinent to clarify at this stage that an employee is not an "undertaking" under Articles 85 or 86 EEC. Hence agreements, however restrictive, concerning the employee-employer inter relationship are outside of those provisions. This principle extends to the results of collective bargaining between employer and employee organisations.

(i) Selection of dealers by supplier

With regard to selective distribution criteria suppliers may set criteria as to the qualifications of staff without infringing Article 85. Thus a dealer refused supplies because his staff do not meet the suppliers standards almost certainly is without remedy. The supplier, may have to accord supplies to a dealer whose staff do meet his criteria but who uses selling techniques that the supplier disapproves of. If the disapproved of techniques are innovative and modern then the Commission will construe a refusal to supply as a means of preventing new business techniques and as a barrier to entry.¹²⁴ They will not view the refusal as a justified attempt to maintain staff standards. Thus, if a supplier of plumbing fittings binds wholesalers to reselling the fittings only to qualified plumbers this may represent an infringement of Article 85 EEC. Ironmongers, DIY stores and department stores may be precluded from selling that suppliers fittings although they are perfectly well qualified to do so. In Grohe¹²⁵ the Commission stated: "Even assuming that there was a need for expert advice and guidance to be provided when selling plumbing fittings to final consumers, such a need would not mean that plumbing fittings could only be sold by plumbing contractors. It is not necessary to be a trained plumber to sell plumbing fittings. The advice and guidance at the point of sale can be provided by specially trained sales staff, and such staff can also be employed in other retail outlets. There is nothing to prevent retail outlets which do not offer plumbing contracting services from employing trained staff to sell plumbing equipment."

(ii) Obligations imposed by suppliers on dealers

Suppliers may contractually require dealers to hire qualified staff or to have existing staff trained by the dealer or by the supplier.¹²⁶ Restrictions of this nature are exempt under the bloc exemptions on exclusive dealing and purchasing.¹²⁷ It is accepted that such restrictions may be necessary in order to protect the suppliers reputation (inexperienced staff may incorrectly advise customers who become disenchanted).¹²⁸

(iii) Recommendations made by trade associations to members

An association which recommends standard criteria that members should comply with when hiring staff may violate Article 85. This will occur where the recommended standards are of a level higher than that necessary to meet the "needs" of the goods or services provided. These

"needs" may be determined by reference to the needs of the supplier in terms of reputation and the needs of the consumer in terms of adequate advice and assistance. The more complex the product or service the greater the need for specialist staff. If an association recommends unnecessarily high standards this might create entry barriers since the expense of hiring staff will rise so adding to the overall cost of entry. The effect will be exacerbated if association membership is considered a commercial necessity so that an incentive to comply with its recommendations exists.

Trade association recommendations that are as a rule complied with by members constitute "decisions" of associations for purposes of Article 85(1) EEC.¹²⁹

II. United Kingdom Law

(i) Whether staffing restrictions registrable under RTPA 1976

Prima facie staffing restrictions are exempt from registration under Sections 9(6) and 19(6) RTPA 1976. This reads:

"In determining whether an agreement is an agreement to which this Act applies by virtue of this Part, no account shall be taken of any restriction or information provision which affects or otherwise relates to the workers to be employed or not employed by any person, or as to the remuneration, conditions of employment, hours of work or working conditions."¹³⁰

The exemption is drafted very widely, it excludes from the RTPA 1976 restrictions and information agreements which directly or indirectly concerns: workers to be employed; workers not to be employed; and terms and conditions of employment. The first two of these categories are ostensibly wide enough to exempt association recommendations as to staff qualifications, recommendations not to employ staff with less than a minimum requirement of qualifications, requirements that staff be actually trained by a supplier or a dealer etc.¹³¹

However, in ABTA¹³² the RPC construed Section 18(6) (the services exemption) very narrowly. First, the Court held that Parliament had not intended restrictions that are clearly against the public interest to be excluded from control.¹³³ Secondly, the Court stated that they had jurisdiction over such restrictions where they represented a "... component of a cluster of restrictions all constituting a manner of trading."¹³⁴ From this it would appear that for a staffing restriction to be registrable it must: (a) be restrictive; and (b) form part of a cluster of restrictions which concern the manner of trading. The judgment of the

RPC does not make it clear whether (a) and (b) must both exist for the Act to apply or whether either (a) or (b) will suffice. After ABTA it is not safe to assume that staffing restrictions in trade association SFC's are excluded since such restraints (as in ABTA) are invariably part of a group of restrictions on members covering for example, premises, financial integrity etc.

Finally, on this issue the correctness of the ABTA interpretation of Section 18(6) must be doubted. The RPC, contrary to the whole philosophy of the Act, answered a question on the legal construction of a statutory provision by reference to the economic effect of the restriction in question i.e. the staffing restriction is economically restrictive therefore it is within the Act. However, it is axiomatic that whether a restriction is within the Act is decided by the form of the relevant clause and not its economic effect. ABTA is hence a radical departure from normal methods of construction of the Act. Furthermore it conflicts with other decisions of the RPC on construction of the exemptions in Section 9 and 18 which seem to deny that an effects based approach applies to those provisions.¹³⁵

(ii) Types of registrable restriction: Section 21(2)

If ABTA is to be accepted then the OFT will scrutinise agreements for staffing restrictions, many may be dealt with under Section 21(2). ABTA gives some indications as to the criteria for assessment, especially as regards trade association recommendations. First, the restrictions must not deny consumers the choice between lower quality services and cheaper goods, and, higher quality services and dearer goods. Secondly, the restrictions must not raise traders costs by imposing on them unnecessarily onerous requirements. Thirdly, the restrictions must not hinder entry to the market (this will be a consequence of the second factor). Fourthly, the restrictions must not hinder the development of technology and other forms of labour saving inventiveness.

In ABTA No. 2¹³⁶ the RPC gave guidance as to the principles which should govern the legality of staffing restrictions. These principles will be relevant to the OFT in their application of Section 21(2) RTPA 1976:

- (a) Number of years and experience and training: restrictions on the number of years relevant experience an employee must have had before being placed in a specified position (e.g. which requires

dealing with and advising the public) may be acceptable if the requirement does not go beyond what is strictly necessary to meet the requirements of the consumer. Likewise with training qualification which require an employee to have obtained a requisite qualification. These may be acceptable where access to training courses is not unduly restricted and the course provides a clear yardstick for the assessment of competence. The standard of the qualification should be set at the minimum level which is necessary to enable the employee to become equipped with specialised skills appropriate to the job.

- (b) Number of staff that should be employed: requirements that a specific number of staff be hired may be restrictive if this discourages employers from using labour-saving technology in their offices. It will further be restrictive if it raises entry barriers to new firms who are forced to hire more staff than they might personally consider necessary or financially viable.
- (c) Nature of employment: requirements that no part-time employees be hired may be restrictive where, as in (b) above, this leads to obstacles to the introduction of new technology and/or entry barriers as a result of increased costs.
- (d) Identity of employee: in some sale of assets agreements whereby X purchases the business of Y there will be a clause preventing Y from setting up in competition to X for a specified number of years within a specified geographical area. Moreover, there may be a clause prohibiting Y from hiring any or poaching any of the staff of X for the duration of the agreement. No poaching clauses may be found in contracts given Section 21(2) dispensation by the OFT.¹³⁷

(iii) Section 79, Fair Trading Act 1973: Restrictive Labour Practices

Section 79 FTA 1973 institutes a machinery for allowing the MMC to investigate restrictive labour practices. These are defined in Section 79(5) to mean restrictions or requirements which operate in relation to the employment of workers in any commercial setting or in relation to work done by any such workers. However, the restrictions must also be: (a) such that they can be discontinued without breaching any statute or statutory instrument; and (b), not necessary for, or in excess of anything required for, the efficient conduct of the relevant commercial activities. Section 79(5) excludes restrictions or requirements relating exclusively

to rates of remuneration. A practice whereby no worker may earn more than £X per hour would thus be excluded. Though, is a practice whereby no worker may earn more than £X per week one relating to "rates" of remuneration? The intention of the Act would seem to be to exclude this also though some commentators consider otherwise.¹³⁸

The MMC may, upon a reference by the Secretary of State, consider: (i) whether the practice exists; (ii) whether it is a restrictive labour practice within the meaning of the Act; (iii) whether it can be expected to, or does, operate against the public interest; and (iv) what particular adverse effects the practice may be expected to, or does, exert. In practical terms Section 79 has little, or no, use.

J. ADVERTISING AND TRADE FAIRS

Trade association SFC's which seek to regulate advertising may be anti-competitive. Advertising is an integral part of competition. Hence agreements restricting the amount parties may spend, or the style or content of adverts may distort competition. Conversely some advertising restrictions which seek to ensure that parties do not mislead the public or which seek other acceptable goals may be acceptable despite restrictive effects. Furthermore industry wide advertising may enhance competition where it facilitates more intensive marketing.

Suppliers may impose advertising restrictions upon dealer and distributors. These are generally not restrictive as they enhance the marketing of the suppliers goods or services.

I. EEC Law

(i) Joint industry wide advertising

Prima facie joint advertising is not contrary to Article 85 where it is designed to draw the buyer's attention to the products of an industry; as such it does not restrict competition between the participating enterprises.¹³⁹ However, industry wide advertising is restrictive if it becomes a substitute for private initiatives. In such a case competition in advertising is totally negated.¹⁴⁰ In some cases however the Commission has exempted under Article 85(3) advertising restrictions imposed by trade associations in respect of trade fairs (see below).

Trade association rules regulating the manner or form of members advertising or the amount of money devoted to it may infringe Article 85.

If an association requires members to refrain from advertising low quality products in favour of high quality products this distorts competition between different grades of product and hinders the consumers ability to make a proper choice between grades of product. An association directive which requires members to refrain from advertising a specific product because of recently discovered doubts concerning the health or safety consequences of that product may be exemptable under Article 85(3) but the trade association recommendation or rule would have to be notified to the Commission. The Commission has intimated that an agreement between parties to promote domestic products at the expense of foreign imports may infringe Articles 85 or 86 EEC.¹⁴¹ Thus, a "Buy British" campaign could conceivably violate competition rules. Though for an effect on trade between the Member States to occur the campaign would presumably have to be of substantial proportions. A trade association that is controlled by the Government may be treated as a public undertaking. Buy national campaigns which encourage consumers to discriminate against imports will infringe Article 30 EEC which prohibits measures having equivalent effect to quantitative restrictions on trade (i.e. protectionist measures of a non-financial nature)¹⁴².

(ii) Funding of joint advertising

Joint advertising may achieve results that parties individually would have been prevented from achieving through prohibitive costs. It thus enables the parties to more intensively market their product in competition with other brands or substitute products. Moreover, by collectively advertising parties will pay their fair share of the costs and hence no one will benefit or "free-ride" on the advertising efforts of another. Formula used in calculating each parties contribution to costs must be drawn up with care. Preferably the fees should be proportional to each parties utilisation of the advertising. The Commission might object if an analysis of the fee structure revealed that large firms were subsidising smaller firms, or, where the fee is uniform irrespective of size, that small firms subsidised large firms. The latter is probably the more serious restriction on competition. It might be that a contribution based upon a specified percentage of the turnover on the advertised product is a reasonable means of assessment.¹⁴³

(iii) Trade Fairs

Trade fairs are commonplace in all Member States. They are invariably run by the national trade associations of the manufacturers of the relevant exhibited products. A number of restrictions may occur in the rules applicable to the exhibition. First, there may be prohibitions on exhibitors participating, either directly, or indirectly through representatives or advertising, in other similar exhibitions during a set period prior to the exhibition or in other exhibitions not approved by the organising trade association. Secondly, there may be sanctions against persons infringing the first rule which take the form of expulsion from the current main exhibition or the ensuing one, or, the granting of a less favourable or reduced stand at the main show or the ensuing one.

These trade fair rules may gain Article 85(3) exemption.¹⁴⁴ The Commission have accepted that the restrictions may have beneficial consequences. The exclusivity rules encourage traders to concentrate their exhibition activities on one event where almost all the relevant products or services are on show.¹⁴⁵ This is more economical, it intensifies competition between suppliers and enhances technical progress. It is more convenient for users and buyers who can see the whole range of products and services at one time without having to travel around. Moreover, trade fairs and exhibitions are generally only one form of advertising and the restrictions will not therefore eliminate a high degree of competition.

Where an association imposes a penalty for breach of the sales then the procedure for assessing the alleged breach should comply with the rules of natural justice; there should be adequate appeal procedures for dealers who have been penalised, this might include recourse to arbitration.¹⁴⁶

The Commission might include notification obligations in any decision granting exemption under Article 85(3). These may include notification on: all expulsions from the exhibition, other penalties imposed on traders, lists of other exhibitions at which the association allows members to exhibit, correspondence between associations organising trade fairs.

(iv) Advertising restrictions in supplier-dealer relations

It is perfectly legal for suppliers to require dealers to follow the suppliers instructions on advertising,¹⁴⁷ or for dealers to submit

advertisements in advance to the supplier for approval.¹⁴⁸ Though the Commission may be suspicious of a requirement that dealers must submit advertisements on prices and terms and conditions for prior approval. Such a requirement could suggest an attempt by the supplier to control vertical prices and terms.

In an exclusive dealing contract the dealer may be prohibited from advertising outside of his contract territory, though he **should** retain the contractual right to satisfy unsolicited orders made from outside of his territory.¹⁴⁹ Within his contract territory the dealer may be required to **accept** advertising **obligations**, for example, with regard to regularity, forum, value (perhaps as a percentage of turnover) etc.¹⁵⁰ The dealer may be required to sell the contract goods under trade marks, or packed and presented as specified by the supplier.¹⁵¹ The Commission consider that these restrictions do not restrict competition so would not be within Article 85(1).¹⁵² Accordingly, advertising obligations may be accepted by a supplier for example with respect to international advertising.

II. United Kingdom Law

(i) Legal framework

(a) Under the RTPA 1976 – Distinction between goods and services: For inexplicable reasons advertising restrictions concerning goods are not registrable whereas advertising restrictions concerning services are. Section 11(2)(d) RTPA 1976 requires the registration of agreements relating to "the form or manner in which designated services are to be made available, supplied or obtained." An advertising restriction is one on the manner in which services are made available. No equivalent provision exists for goods. Hence recommendations by trade associations concerning goods advertising are not registrable, where they concern services they are.

The OFT have granted Section 21(2) dispensation to a number of services agreements containing advertising restrictions. Many have no real economic impact. Thus, for example, Section 21(2) dispensation was accorded in Outdoor Advertising Council¹⁵³ where the Council recommended a voluntary code designed to conserve energy by restricting the use of electricity for advertising lighting. Under the code users of illuminated signs would, inter alia, choose to use electricity to illuminate that sign for one and only one of

the following periods: (a) the hours during which the premises are open for business; or (b), the hours between mid-day and mid-night. Compliance with the code was entirely voluntary and hence users were not restricted as to the forms of advertising they adopted. In Society of Catering and Hotel Management¹⁵⁴ the Society promulgated a Code of Ethics for the use of hotel management consultants. The Code was given Section 21(2) dispensation after a clause which read, "A member shall not promote his/her professional services through any advertising media," was deleted.

Agreements restricting the advertising of fees or restricting the choice of advertising media or which prohibit styles of advertising which reasonably disparage rivals or challenge their services will not be suitable for Section 21(2) treatment. Such advertising is an integral part of competition.¹⁵⁵ Thus in Sharman Newspapers¹⁵⁶ an agreement between Sharman Newspapers and the City of Peterborough Estate Agents Association (CPEAA) was referred, by the OFT, to the RPC. Under the agreement members of the CPEAA accepted a restriction not to obtain press advertising services for regular "sales by private treaty" or "sales by auction" from newspapers circulating in the same area as the Peterborough Classified Standard without also obtaining the same in the Peterborough Classified Standard. This latter paper was owned by the Sharman Newspapers company. In return that company gave discounts on the space purchased by estate agents in membership of the CPEAA. The discounts given entailed, inter alia, a 10% allowance on the normal rates where payment for advertising services was made by the last Friday of the month following invoice date. Sharman Newspapers did not give this discount to non-members of the CPEAA. The parties gave undertakings to the RPC that they would not give effect to or enforce the above agreement, or, enter into any other agreement to like effect. Breach of such an undertaking is contempt of court. The agreement was objectionable because it created entry barriers to newspapers who sought to compete in providing property advertising services with Sharman Newspapers. Members of CPEAA were discouraged from placing advertisements with such papers because they were contractually bound also to place advertisements with papers belonging to Sharman Newspapers. The incentive to patronise rival papers was hence low.

- (b) Sections 9 and 18 RTPA 1976 — Advertising restrictions in distribution agreements: Sections 9(3) and 18(2) RTPA 1976 require

that terms relating exclusively to the goods or services supplied are to be "disregarded" when operation of the Act is being considered. If the agreement concerns goods distribution it will not in any event be registrable and recourse to Section 9(3) is superfluous. If the agreement concerns services then Section 18(2) should permit such restrictions to be disregarded. A restrictive clause concerning advertising is a term relating exclusively to the services provided so may be exempted.

Section 9(3) or 18(2) would not apply to exempt dealer or franchisee clubs. Where all of the dealers of a supplier (or the franchisees of a franchisor) agree to abide by the majority decision at a meeting designed to determine how best to promote and advertise the suppliers (or franchisor's) brand or trade mark then an agreement that is registrable under Section 11(2)(d) RTPA 1976 might arise where the advertising concerns services. Sections 9(4) and 18(3) RTPA disapply Sections 9(3) and 18(2) as between parties at the same level of distribution i.e. those provisions only effectively apply along the supplier-wholesaler-dealer chain.

(ii) Trade Fairs

Many trade fairs rules will be registrable. If they regulate or prohibit the extent to which exhibitors may participate in rival fairs this may be a restriction under Section 11(2)(b) i.e. restriction on terms or conditions on or subject to which the service of providing exhibition facilities will be supplied. If there are penalties for non-compliance with the rules these may be registrable under Section 11(2)(e) i.e. restriction on persons for whom the service of providing exhibition facilities to be made available or supplied. If the organising trade association will not provide display space to a person who has displayed in a rival fair this is a restriction on persons to whom services will be supplied. It might also be a restriction under Section 11(2)(b) i.e. restriction on conditions subject to which service will be provided — the association impose the condition that they will only provide exhibition facilities where exhibitors have not displayed in rival fairs. Where the trade fair attracts a significant number of foreign exhibitors or (more likely) purchasers then the rules will have to comply with Article 85(1) EEC (see above) since there will be an effect upon trade between the Member States. Where the Commission have granted exemption under Article 85(3) EEC it has been OFT practice

to refrain from referring the agreement to the RPC using the Section 21(1)(a) RTPA 1976 procedure whereby the OFT may refrain from taking proceedings in respect of an agreement authorised or exempted under EEC law. Thus in Society of Motor Manufacturers and Traders¹⁵⁷ no reference was made to the RPC, despite the trade fair rules containing significant restrictions, because of a formal exemption granted by the Commission. Presumably, a comfort letter given by the Commission would also suffice under Section 21(1)(a), it is after all an "authorisation".

Where no EEC authorisation or exemption exists parties may have to remove some of the restrictions, e.g. on exhibiting in other fairs, if they wish to benefit from Section 21(2) dispensation.

(iii) Funding of joint advertising

Where industry wide advertising is undertaken individual members of the association or body undertaking the advertising will have to fund the activity. Usually the extent of an individual firms contribution is determined by reference to the amount of total value of the product or service supplied. Where the association is advertising goods these schemes are registrable under Section 6(4) RTPA 1976. This states, in pertinent part, "... an agreement to make payments calculated by reference - (a) to the quantities of goods produced or supplied by him ... being payments calculated, or calculated at an increased rate, in respect of quantities of goods or materials exceeding any quantity specified in ... the agreement, shall be treated ... as a restriction in respect of the quantities of those goods" Thus an agreement to pay a sum to an association based upon the amount of a product sold is a restriction as to quantities under Section 6(1)(d). There is no reason why such agreements should not be suitable for Section 21(2) treatment¹⁵⁸ provided the association is not used for some covert purpose e.g. profit pooling where parties pay moneys into a central association which distributes it according to an agreed formula. Profit pooling is a form of market sharing (see Chapter 8).

There is no equivalent to Section 6(4) in the services part of the RTPA 1976. However, some funding schemes for central advertising are probably registrable under Section 11(2)(a) and/or (b) RTPA 1976. Suppliers of services who pay a levy to an association in consideration for central advertising will be purchasers of advertising services. Thus, if purchasers collectively agree as to the prices they shall pay for advertising services this presumably is an agreement registrable under

Section 11(2)(a). If the purchasers agree as to the terms and conditions upon which the advertising services are to be acquired by them this is registrable under Section 11(2)(b). As with goods agreements there is no reason why Section 21(2) should not apply.¹⁵⁹

(iv) Competition Act 1980

Advertising practices carried on by trade associations that are exempt from the RTPA 1976 may be investigated under the CA 1980 (provided of course that the association can be said to be carrying on business so as to satisfy that Act). Likewise certain practices carried out by economically powerful suppliers may be subject to the CA 1980. One such is the granting of discounts to retailers who reserve a percentage of their display space for the suppliers goods. This may create an entry barrier for smaller firms seeking advertising outlets for their products.¹⁶⁰

The advertising industry has been involved in a number of investigations under the CA 1980. Though the practices complained of have usually had more to do with pricing policies than advertising per se. In Scottish Universal Newspaper Ltd.¹⁶¹ a free advertising newspaper was used as a predatory device to exclude a new entrant, advertising space was sold at below cost. The anti-competitive conduct was predatory pricing. In Essex County Newspapers¹⁶² ECN employed discriminatory criteria for deciding who they would allow to advertise real estate in their newspapers. The OFT concluded that because ECN was dominant in the relevant property advertising market it had the power to affect the relative ability of different property agents to compete in the Colchester area house agency market by its decision on whether or not to accept advertisements. In Sheffield Newspapers¹⁶³ SN prohibited retailers of their papers from circulating "free-sheets" to customers; they refused to accept advertising copy from those who had advertised or intended to advertise in a particular rival production; and they granted quantity discounts to estate agents who placed a substantial amount of their advertising with the company. The OFT declared these practices to be anti-competitive. SN gave undertakings to the OFT in respect of certain of the practices. The OFT referred the remaining practices to the MMC.¹⁶⁴ The MMC held that the prohibition on retailers circulating "free-sheets" was anti-competitive and contrary the public interest. With regard to the discounts the MMC held that they did not exert a sufficient enough impact upon the market to be anti-competitive. In British Telecommunications

(Pricing Policy for the Placing of Advertisements in Yellow Pages)¹⁶⁵

British Telecommunications (BT) incorporated in the price of Yellow Pages advertising space a cost component for advertisement creation and campaign planning services which they provided. Hence, it was complained, advertisers were forced to accept BT services as well as advertising space since the two were effectively tied together. Advertising agencies asserted that this created a barrier to them in that it penalised advertisers who wished to hire independent agency services but who were nonetheless forced to pay for BT services. The OFT concluded that the practice of BT was not economically significant enough to exert anti-competitive consequences.

Where a dominant concern employs advertising to deter new entry an anti-competitive practice might arise. If X, a dominant supplier, on learning that Y is considering entry to the market, suddenly offers a plethora of free gifts with its products and/or conducts an aggressive advertising campaign designed to nullify the effects of the rivals introductory campaigns then this might amount to anti-competitive conduct.¹⁶⁶

K. STANDARDS, QUALITY CONTROL AND DESCRIPTION

Undertakings, invariably under the aegis of a trade association, may seek to standardise the language they use in promoting goods or services. This may help the consumer where it facilitates the making of comparisons between different goods or services. If X, Y and Z all produce a relatively homogeneous product but market their products using different technical, descriptive language and in different size packages then consumers may make uneducated buying decisions. The disparities in the styles of marketing **may hide** differences in quality and content of the various brands. Thus, X might sell low grade beans in 500 grms tins for 50 pence whilst Y might sell high grade beans in 400 grms tins for 48 pence. Buyer P wishes to purchase lower grade beans at an economy price but purchases the higher quality beans erroneously thinking them to be better value. P is thus misled due to the lack of conformity between brands as to packing sizes. Alternatively X and Y might sell products which are relatively similar in very different style packages and using very different labels and descriptions. Buyer P might purchase product X not realising that there is a competing brand Y which might be better value. These differences may not lead to confusion where competing brands are sold in close physical proximity to each other as when

they are sold together on a supermarket store shelf. However, where no proximity exist as when the goods are simply itemised on a product list then the scope for confusion increases. Thus, lack of conformity in product description or presentation can lead to distortions of the market where buyers made uneducated buying decisions, competition may be enhanced, and rendered more efficient, where buyers are able to easily compare the merits of different products.

Another economic consequence of standardisation is that where packaging is standardised, e.g. where coffee tins are of roughly similar size or cardboard boxes are of roughly similar construction, scale economies may be realised in the production of such packaging. If X, Y and Z all agree on packaging construction and size then suppliers of such packaging to X, Y and Z may be able to realise scale economies (fewer design lines, greater rationalisation) which may be passed on to X, Y and Z and ultimately on to their customers.

I. EEC Law

Harmonisation measures taken by a trade association, or by undertakings, which do not extend beyond legitimate appellation or quality control may be outside of Article 85(1) EEC. The Commission adopt this view with respect to the use of a common label to designate a certain quality where use of the label is available to all competitors on the same conditions.¹⁶⁷ There is no objection to rendering use of the label subject to a one-off or periodic payment to the association. However, the charge *should* be commensurate with the actual burden suffered by the association with respect to administration, market research etc. The charge *might* restrict competition if it acts as a deterrent to use of the label. The association may set a standard that must be met by undertakings using the label.¹⁶⁸ However, there must be no attempt to remove certain qualities of product from the market or enforce standards on the parties. Parties must remain free to sell lower or higher quality goods than those designated by the label, appellation or trade mark etc.¹⁶⁹

Where the association provides national advertising and promotion on behalf of the label, appellation, trade mark etc., the parties must remain free to conduct their own advertising.¹⁷⁰ Associations may perform reasonable quality control activities designed to ensure that goods or services using the label etc. do actually conform to the requisite standard.¹⁷¹ This is especially important to associations who provide general publicity for the label. Clearly, the integrity of the label etc. will suffer if goods or services not living up to the requisite standard employ the label and gain

the benefit of the associations advertising.

Article 85(1) is infringed if, with respect to the goods using the label, parties accept restrictions.¹⁷² Thus, there must be no restriction on advertising goods without the label since this distorts competition between non-labelled and labelled goods.¹⁷³ It is, however, acceptable to require parties to the agreement to advertise the labelled product. Though, if the obligation were so extensive that in practice compliance with it rendered effective advertising of non-labelled qualities impossible then a breach of Article 85(1) might arise e.g. parties must expend 85% of their total advertising budget upon the labelled product. Quality or other labels may not be used to hinder parallel imports.¹⁷⁴ It is obvious that the association must not impose selling price restriction on members e.g. parties shall maintain resale prices of goods with quality labels.¹⁷⁵

In the context of distribution networks it is acceptable for suppliers to require goods to be packaged in a certain manner or to have trade marks attached to them by dealers.¹⁷⁶

II. United Kingdom Law

(i) Exemption from the Act

Section 9(5) (goods) and 18(5) (services) RTPA 1976 require that in determining registrability no account shall be taken of any term in an agreement providing for the compliance with: (i) standards of design, dimension, quality or performance; or (ii) arrangements as to the exchange or dissemination of information on such standards. This exemption for standards is not absolute, it applies only to standards approved by the British Standards Institute (BSI), or, to standards approved by the Secretary of State under statutory instrument. (See Chapter 1 Section E and Chapter 12 Section H for further details).

(ii) Treatment under Section 21(2) RTPA 1976

Where no exemption exists because no approval lies then agreements concerning *product/service standards* must be registered. In applying Section 21(2) the OFT may take into account many of the factors discussed above in respect of EEC law. Such agreements are often dealt with under Section 21(2) RTPA 1976.¹⁷⁷ Occasionally, an agreement specifies standards and also recommends withdrawal of products not conforming to the standard. As a rule such an agreement is unsuitable for Section 21(2) treatment because it denies the consumer choice between approved and non-approved qualities. However, where the recommendation to

withdraw is made on environmental or health grounds it might be acceptable albeit that this appears to be a public policy criteria that the OFT should not consider under Section 21(2) RTPA 1976.¹⁷⁸ In Hard Nonionic Detergents¹⁷⁹ the Soap and Detergent Industry Association recommended a ban on the sale of hard nonionics in detergents because these ionics were a major cause of foaming in sewage works and water courses. The association appreciated that such a ban would have economic repercussions entailing extra costs and processing difficulties for some users. However, the association considered the environmental question paramount. The OFT obtained Section 21(2) dispensation for the agreement despite the recommended ban clearly being significant in economic terms.

(iii) Terms in supplier-dealer agreements: Sections 9(3) and 18(2) RTPA 1976

Restrictions contained in individual agreements between suppliers and dealers relating to descriptions of goods, or packaging etc. will be exempt from registration under Sections 9(3) and 18(2) RTPA 1976 as terms relating exclusively to the goods or services supplied or provided.

(iv) Interpretation by the RPC

The word "descriptions of goods" in Sections 6(1)(d) RTPA 1976 i.e. restrictions on the "... quantities or descriptions of goods to be produced, supplied or acquired" means "kinds of goods". There is no equivalent wording in Section 11 RTPA 1976 for services. Thus an agreement between X and Y to use a particular description or nomenclature for different grades of a product is not a restriction within Section 6(1)(d).¹⁸⁰ Hence it appears that agreements as to descriptions are not registrable.

In an unreported case in 1969, National Association of Scaffolding Contractors (No. 644 on the Register of Restrictive Trade Practices) the RPC held that a recommendation to members of the association concerning a model form of conditions for the hire, erection and dismantling of scaffolding was in the public interest. The recommendation was pursuant to a Governmental report on safety and health in the construction industry, it read: "Hirers and owners of scaffolding should be urged to use the model forms of contract documents among other things to alert both of the parties as to their responsibilities for safety of the scaffold. The contract documents should give ample descriptions of the purpose and detail of the scaffolding including a section on safety."

The judgment of the RPC in this case supports the general approach

of the OFT under Section 21(2) to standards, quality control and descriptions viz., that restrictions incorporated with safety motives in mind ~~may be~~ acceptable but that restrictions seeking to limit consumer choice ~~may be~~ unacceptable.

L. CUSTOMERS, END-USER RESTRICTIONS

Restrictions influencing the ultimate customer or end user may arise in a wide variety of forms and circumstances. Indeed, there appears to be no consistent principles which apply so that every case must be treated on its merits. This section simply highlights some of the problems, it does not purport to be exhaustive.

I. EEC Law

(i) Under Article 85 EEC

Restrictions imposed on customers or end-users may often be restrictive since their objective is to limit competition between seller and buyer. The European Court has indicated that clauses in contracts of sale restricting the buyers freedom to use goods supplied in accordance with his own economic interests infringe Article 85. Hence a contract which imposes upon the buyer an obligation to use the goods supplied for his own needs, not to re-sell the goods in a specified area, and to consult the seller before soliciting business in another specified area infringes Article 85(1) EEC.¹⁸¹

In exceptional cases end-user restrictions may be justified. In Kathon Biocide¹⁸² the Commission issued a comfort letter to market leaders in isothiazolone technology and development who reserved the right to require from buyers that only a certain grade of Kathon biocide and no others be used in preparing cosmetic, toiletry and other human contact applications. These user restrictions were justified in the light of health requirements and the existing legislation in some Member States.

Customer restrictions are justifiable, to a degree, in vertical distribution networks. Thus a supplier may require an exclusive dealer to refrain from actively soliciting customers outside of his territory by direct advertising or the institution of warehousing facilities. Restrictions which go no further than this may claim bloc exemption under

Regulation 83/83/EEC on exclusive dealing contracts.¹⁸³ However, such exemption is unavailable if the supplier prohibits the dealer from accepting unsolicited orders made from outside of his territory. The Commission accept that dealers may be restricted in their choice of customers to those within their territories, this concentrates the dealers efforts and helps improve the efficiency of the distribution network. However, the Commission also demand that dealers must remain free to supply parallel importers who come to them from outside of their territory and who intend to take the goods back to another territory where they are priced more highly. The Commission have stated in an explanatory memorandum to the Regulation that clauses which impede the dealer in his free choice of customers are outside the scope of the bloc-exemption.¹⁸⁴

(ii) Under Article 86 EEC

An undertaking in a dominant position may have an obligation to supply all those customers who make orders. Where no alternative supplies exist refusal by the dominant supplier may put the buyer out of business. Refusal to supply a customer is an abuse of dominance if it is not justified.¹⁸⁵ It will never be justified if the refusal to supply is designed to exclude the customer from the market.¹⁸⁶ Nor may a dominant supplier refuse supplies because the customer promotes a rival brand.¹⁸⁷ However, not every refusal to supply is unlawful. In times of crisis when supply of a product is in very short supply (e.g. supply of oil during the 1973 oil crisis when OPEC countries reduced supplies dramatically to the west¹⁸⁸) it is not an abuse of dominance for suppliers to rank their customers in order of priority and supply them proportionately with the inevitable consequence that low priority customers receive no or reduced supplies.¹⁸⁹

It is probably always abusive for a dominant supplier to refuse supplies unless the customer accepts restrictions on the territory in which the goods may be resold,¹⁹⁰ or the usage to which the goods may be put.¹⁹¹ Any collateral condition imposed upon an unwilling customer is likely to be an abuse.¹⁹²

II. United Kingdom Law

(i) Under the RTPA 1976

Agreements between persons as to the customers they will or will not supply are registrable under Sections 6(1)(f) (goods) and 11(2)(e)(services) as agreements containing restrictions on the classes of persons to whom goods or services will be supplied. Where such agreements aim to divide up a market between parties they will be inappropriate to Section 21(2) treatment and will almost certainly be referred to the RPC. The Court has, in the past, taken a dim view of market sharing.¹⁹³

In Diazo Copying Materials¹⁹⁴ the RPC held that a clause in a joint venture agreement which effectively limited one party in its capacity to supply customers was not registrable. Under the agreement HTL manufactured photocopiers to the order of MSL. MSL had an exclusive right to sell the product throughout the world but granted to HTL a non-exclusive non-assignable right to make retail sales in the United Kingdom. By this means HTL and MSL imposed restrictions on HTL's ability to seek customers outside of the United Kingdom. However, the RPC held that the restrictive term was one which related exclusively to the goods supplied so was therefore to be disregarded when determining the application of Section 9(3) RTPA 1976. Thus, if joint venture partners wish to impose area or customer restrictions inter-se it would appear that if they grant one party an exclusive selling right of the joint venture product or service and then that party grants the other a license to sell restricted as to area then the agreement is not registrable provided it contains no other registrable restrictions.

The OFT scrutinise customer and end-user restrictions carefully. In exceptional cases only will they be suitable for Section 21(2) treatment. Thus, in General Council of British Shipping (GCBS),¹⁹⁵ the GCBS made recommendations to members concerning the carriage of disabled passengers. These recommendations were designed to encourage the adoption of practices and procedures which would enable members to provide for the needs of disabled passengers more effectively. There are very few competition issues here; the market for disabled passengers being small relative to other categories of passenger who do not have special needs. Moreover, the recommendations were clearly in the public interest. In Independent Marketing Services¹⁹⁶ the OFT objected to joint-buying consisting of wholesalers in the grocery field who imposed restrictions on participating companies in respect of the supply of goods

to members of the public. The OFT gave Section 21(2) dispensation only after the Group altered its rules to free participating companies to supply whomsoever they choose. In Access Consortium¹⁹⁷ Lloyds Bank, Midland Bank, National Westminster Bank, and, Williams & Glyn's Bank, agreed that in view of limitations on the processing capacity of the Joint Credit Card Company Ltd. which produced bank cards, the number of cards issued by each Bank should be limited to an agreed number and that each party would recruit customers only from those holding an existing account with that party. In practice the operational restraint arising from the Joint Credit Card Company's lack of production capacity did not prevent any party issuing the number of cards it wished nor was there any deterrent effect upon recruitment. The agreement expired by effluxion of time and was formally terminated in 1980. Since the agreement had no restrictive effect in practice and was in any event terminated there would have been no need for further official action. However, it must be very doubtful whether an agreement between oligopolistic competitors to share supplies and limit sales during a period of shortages in supply would ever be suitable for Section 21(2) treatment. In the EEC context co-operation agreements in crisis times have been condemned by the European Court as illegal market sharing devices.¹⁹⁸

(ii) Under the Competition Act 1980

The OFT and MMC have concluded that an economically powerful supplier who refuses to admit certain categories of customer/dealer to their distribution networks on the basis that the customer/dealer employs new and inventive selling methods that the supplier objects to may be acting anti-competitively if, in other respects, the customer/dealer meets the suppliers criteria as to qualifications, adequacy of premises and staff etc.¹⁹⁹ The MMC has said that suppliers must not use selective distribution criteria to hinder new and innovative dealers obtaining the suppliers brand of goods. In particular the MMC has considered such customer/dealers as discounts warehouses and multi-function department stores.

M. TYING CLAUSES

I. Legal and Economic Framework

(i) Nature of tying: examples²⁰⁰

Tying occurs where a supplier requires customers to acquire, as a condition of acquiring a main product (the tying product), another product (the tied product). Tying can also occur where a supplier encourages customers to acquire a tied product because of some pricing advantage or discount offered. The following are example cases:

Example (a): Supplier enjoys a monopoly over widgets, he refuses to sell widgets unless customers also take gidgets from him (two goods tied together).

Example (b): Supplier sells widgets and requires purchasers to accept a maintenance/guarantee contract for the servicing of the widget (goods and services tied together).

Example (c): Supplier sells widgets at a price which includes provision of maintenance services by supplier. If customer does not want maintenance services the overall price does not change.

Example (d): Supplier sells widgets at £x, however, if purchaser also takes gidgets from the supplier at full price then the price of widgets reduces to $\frac{x}{2}$. In this example purchasing both widgets and gidgets operates to effectively tie the products together.

Example (e): Supplier sells widgets at £x which includes a built in amount for provision of maintenance services. If customer does not wish maintenance/guarantee services then the price for the widget is reduced but not by an amount commensurate to the value of the service. Where the price of goods and services combined amounts to £100, goods alone to £95, and where the value of the services is £25, then there is a financial incentive on the customer to accept the services. If he rejects the services he still effectively pays for them.

Complaints are sometimes made by customers of tie-ins which appear unfair to the customer but in reality are natural consequences of the market. Thus a customer or user of equipment may consider that he is forced to accept the servicing facilities of the supplier because there is no alternative in the relevant area or because no competitive servicing facilities have yet emerged to challenge the supplier. These situations do not reflect tying. Though if the supplier is dominant in the area then any attempt to charge excessive or discriminatory prices

may be challengeable. Alternatively, if the supplier sought to prevent or hinder the entry of new firms to the market for servicing the equipment e.g. by refusing to make spare parts available, or refusing to license competitors to make spare parts, or refusing to make available servicing and maintenance manuals, then these might represent anti-competitive or abusive practices.

(ii) Objections to and justifications for tying

Suppliers may use tying clauses for a number of reasons:

- (a) Supplier exploits monopoly power over widgets and extends it into market for gadgets over which he enjoys no market power. Thus a manufacturer of a novel type of super-computer ties sales of the computer to sales of memory thereby extending monopoly power over the computer to memory capacity. The supplier, by this practice, may seek to increase his profits. More likely, the intention is to create entry barriers in the market for the tied product.²⁰¹
- (b) Supplier charges different consumers different prices for widgets over which the supplier is dominant on the basis of the intensity of their use of gadgets. For example the supplier of punchcards and relevant machinery may charge a uniform price to all buyers both for machines and for punchcards. However, by tying punchcards he is able effectively to charge a higher price for the machine to those purchasers who use it most intensively i.e. use most punchcards. The objection to this practice is that it is effectively a form of price discrimination.²⁰²
- (c) Supplier seeks to ensure the standard of performance of product A thereby protecting his reputation and customer good-will by requiring that product A only be taken in connection with product or service B. Thus, if the supplier of a new type of photocopier required purchasers to also acquire a new formula of ink and/or a maintenance contract with the supplier then this might be explained by the suppliers desire to protect the integrity of the photocopier. Where the supplier uses this as an excuse to erect entry barriers to rival suppliers of ink or maintenance services it may be anti-competitive.²⁰³
- (d) Supplier supplies product or service A more cheaply if purchaser also takes product or service B where the price reduction relates to economies of scale realised by the supplier. Thus if a supplier sells bulk storage and handling machinery at a lower than normal price where the customer also purchases chemicals or fertilizers etc. from him then the reduced price (which creates an economic tie

through the incentive it presents) may be justified by virtue of scale economies in transport of bulky products.

- (e) Supplier may use tying as a means of penetrating a new market. The US Department of Justice have openly declared that they consider this form of tying pro-competitive. This does not, of course, necessarily reflect the view of the United Kingdom or EEC authorities:

"Another pro-competitive use of tying is to redistribute risk. For example, a manufacturer may induce distributors to carry a new product by selling it to them at a low price, while relying on expected sales of some time item used in conjunction with the new product to generate his profits. The manufacturer, thus, assumes a greater share of the risk that the new product will be rejected by consumers. If the new product proves very popular, the distributors will require many of the related items, and the manufacturer will receive a large reward. If the new product does not succeed, however, the distributors will require very few of the related items and will have to pay very little. The 'risk sharing' efficiency may apply to a wide range of licensing, franchising, and similar distributional arrangements that involve tying."²⁰⁴

II. EEC Law

(i) Under Article 85 EEC

There is not an abundance of case law in the EEC on tying though the practice is referred to as being prohibited under Article 85(1)(e). The Commission however have specifically mentioned full line forcing as permissible in the bloc exemptions on exclusive dealing and purchasing.²⁰⁵ Hence suppliers may require exclusive dealers or purchasers to take "complete range of goods". Though in respect of exclusive purchasing agreements the bloc exemption only applies where the obligation to take complete ranges of goods relates to goods which are connected to each other by their nature or according to commercial usage.²⁰⁶ Full line forcing clauses are common in franchise agreements where the franchise is required to purchase a full range of the franchisors goods and in patent and other intellectual property licensing agreements (for details of which see Chapter 13).

Collective tying will violate Article 85(1) and almost certainly be unsuitable for exemption under Article 85(3).²⁰⁷ Thus, if a trade association recommended to members that they include the price of maintenance and post-sales servicing in the cost of a machine then this would infringe Article 85(1). Trade associations who perform cost-

calculation modelling for members should ensure that in the models and formulae they disseminate they have not tied the costings for different products together.

(ii) Under Article 86 EEC

Tying is prohibited by Article 86(d). It appears to be the case that tying by a dominant concern will be almost habitually an abuse of dominance.²⁰⁸ According to Article 86(d) tying is only an abuse where the tied product or service has no connection with the subject of the contract in terms of its nature and/or commercial usage. Thus, if there is an objectively justifiable relationship between tying and tied product no abuse occurs. The subjective views of the supplier or customer are not decisive on this point. The relationship may be based upon technical or other economically reasonable grounds.

Simply because tying and tied products are technically related, or even interdependent, does not necessarily justify a tie. In IBM Settlement²⁰⁹ IBM, inter alia, tied the sale of main memory capacity to that of Central Processing units (CPU's). Following negotiations IBM gave the following undertaking to the Commission: " Without prejudice to IBM's freedom to design its CPU's, upon announcement of a new System/370 CPU which is to be supplied within the EEC, IBM will offer within the EEC and, upon application of a customer, will supply that CPU at IBM's option either without any main memory capacity or with only such capacity of main memory as is strictly required in order that reasonable tests of the CPU can be effected". The "unbundling" of memory from CPU's required actual physical changes to the CPU's which hitherto had memory capacity built in to them. However, given that IBM were alleged to control over 70% of the world market for main framecomputers the effect of the bundling was to erect entry barriers to rival producers of memory capacity that is compatible with IBM computers.

III. United Kingdom Law

(i) Under the RTPA 1976

Only collective attempts at tying are registrable. Recommendations by trade or service supply associations to members to employ tying terms are likewise registrable. It is most unlikely that collective tying would be suitable for Section 21(2) treatment. This at least was the position adopted by the OFT in Building Societies Association (BSA)²¹⁰. Under Section 101(1) of the Law of Property Act 1925 mortgagees have the power

to insure and keep insured against loss or damage by fire any buildings etc. forming part of the mortgaged property, the premiums to be charged on the mortgaged property. Building Societies hence provide for insurance in their rules which are binding on borrowers. The BSA had, until 1975, recommended to members that insurance be organised by Societies through insurers of their choice. The Societies thus tied financial services to insurance services. Borrowers were not allowed to arrange own-insurance. Societies would earn commission on introductions to insurers which they did not pass on to borrowers. Following the receipt of complaints from members of the public of these practices the OFT informed the BSA that the restrictions were significant. The BSA decided to amend their rules so that in 1975 new borrowers would be given the choice of three insurance companies plus the option to nominate companies of their own choosing. The Society would remain free to reject the nomination where they were unconvinced that: the scope and amount of the cover was equivalent to the Societies normal cover; the service was likely to be satisfactory; and, that the insurer would keep the Society covered should the borrower fail to pay a premium. Moreover, the Society could demand that the policy not be altered without prior notification to the Society.²¹¹ Subsequently, the OFT indicated concern to the BSA that some Societies insisted, as a condition of granting a mortgage, that they should receive some, or all, of the commission payable in respect of linked endowment policies. They indicated that this practice was hard to justify in cases where the Society had not arranged the policy. The BSA, in response, recommended that Societies stop commission sharing where the borrower arranged his own insurance.²¹² As a result of these modifications to existing rules and practices the BSA rules were not referred to the RPC and, ultimately, were given exemption under Section 21(2) RTPA 1976.²¹³

A form of voluntary tying has been accepted by the RPC. In Building Employers Confederation Application²¹⁴ the RPC accepted as being in the public interest an association scheme whereby members had to offer building services with an insurance scheme to customers, there being however no requirement that customers take both service and insurance. The association was seeking to protect purchasers of building and construction services from "cowboy builders". If customers accepted insurance they paid 1% of the contract price or a minimum of £20. The RPC accepted that the scheme was in the public interest and that the restriction - members must not undertake work unless the insurance scheme had been first offered to customers - did not restrict or discourage

competition to any material degree. Thus, customers could buy service and insurance together though they had the option of buying the two services separately. There was no price regime whereby the cost of insurance was included in that for building work thereby creating an incentive for purchasers of building services to also take insurance; buyer could choose between building work alone at a cheaper price or building work plus insurance at a higher price with the difference accurately accounted for by the cost of the insurance. A scheme such as this whereby services could only be sold tied to insurance would probably not have been accepted.

(ii) Under the Competition Act 1980

The OFT have formally investigated one instance of tying under the CA 1980. In British Telecommunications (Pricing Policy for the placing of Advertisements in Yellow Pages Directories)²¹⁵ British Telecommunications (BT) sell advertising space in Yellow Pages directories (YP) through specially appointed sales contractors. They charge a price for space which includes an element for creation and campaign planning services. Advertising agents complained to the OFT of this tying of space to advertising services:

"The advertising agencies case is that BT's sales contractors are placed at an advantage over others who could provide advertising agency services to larger advertisers in that such advertisers which choose to use an alternative provider of such services still have to pay for the agency services offered by the sales contractor because they are included in the rate card price. They argue that there is therefore a financial penalty incurred by all advertisers who wish to exercise choice, and that the presence of this penalty distorts competition in the provision of services to the advertiser between the sales contractors and any others who could provide such services."²¹⁶

The OFT concluded that the tie was not anti-competitive being too insignificant in economic terms to have a detrimental effect. They estimated that the cost of BT contractors providing the services in question was less than 4½% of the total cost of advertising in YP directories, accordingly, they did not consider that this "small amount" would play any part in an advertisers choice between using an advertising agency to provide services or using its own resources to deal with BT and its contractors. The case demonstrates that for tying to be anti-competitive the supplier of the product or service must significantly effect the market for the tied product or service. In this case the OFT concluded that advertising agencies were not hindered by the effect of the

tie-in on the market for the provision of advertising services.²¹⁷

The MMC, in monopoly references, has been highly critical of tying practices.²¹⁸ However, in its General Report into Full Line Forcing and Tie-In Sales²¹⁹ it recognised that tying may be more ambiguous in its economic effects and that there can be pro as well as anti-competitive consequences from the practice. In that Report the MMC laid down a number of guidelines that they considered should be used when deciding whether or not to proceed against tying and full-line forcing:²²⁰

- (a) Does the supplier enjoy market power in the supply of the tying good or service? Where there is little market power because, for example, there are alternative goods/services or alternative suppliers available, then the likelihood of tying being anti-competitive is greatly reduced.
- (b) What is the structure of the market for the tied product and to what extent is that structure fixed or changing? If there are many suppliers of the tied product or service then customers may be loathe to accept a tie from the main supplier. More importantly, if the tie-in forecloses only a small percentage of the market the effect on competition will be insignificant. This was essentially the case in the British Telecommunications case described above.
- (c) Where tying indicates simply the attempt by a dominant supplier to stretch his market power into another market then the practice will almost invariably be anti-competitive.
- (d) Is the tying practice operating within the context of exclusive dealing? The anti-competitive effect is likely to be exacerbated where purchasers are contractually prevented from obtaining supplies from elsewhere.²²¹
- (e) Is there a strong technical justification for the tie as in the case of tying spare parts or maintenance to a main produce as a means of protecting both the suppliers reputation and the products integrity? In such cases tying may be justified.

(iii) Under the Patents Act 1977

Certain tying clauses in patent licenses are void under the Patents Act 1977. For details see Chapter 13 Section D.

FOOTNOTES

1. Cimbel [1973] C.M.L.R. D167; GISA [1973] C.M.L.R. D125.
2. Belgian Industrial Timber Bull E.C. 10/75 para. 2104, **Fifth Commission Competition Report (1975)** para. 37. Commission challenged agreement: fixing maximum purchase price; forbidding quantity rebates; regulating supplier lists; adopting a standard form contract; Belgian Walpaper [1974] 2 C.M.L.R. D102 – Commission decision; see for judgment of European Court Groupement des Fabricants de Papiers Peints de Belgique v. Commission (Case 73/74) [1976] 1 C.M.L.R. 589, [1975] E.C.R. 1491; Tile Trade [1975] 2 C.M.L.R. D1.
3. Belgian Industrial Timber, supra.
4. e.g. Sacchi (Case 155/73) [1974] 2 C.M.L.R. 177, [1974] E.C.R. 409 at p. 431.
5. BRT v. SABAM (Case 127/73) [1974] 2 C.M.L.R. 238, [1974] E.C.R. 313 at p. 317, see also per Advocate General Mayras: "An undertaking in a dominant position is prohibited from going beyond what is reasonable, and the measures which it chooses to attain its object must be the least restrictive possible." See further GEMA I [1971] C.M.L.R. D35.
6. (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461.
7. European Sugar Cartel (Suker Unie) (Cases 40-48, 50, 54-56, 111, 113, 114/73) [1976] 1 C.M.L.R. 295, [1975] E.C.R. 1663 at p. 2016, VBVB & VBVB v. Commission (Cases 43 and 63/82) [1985] 1 C.M.L.R. 27 at pp. 92, 93 para. 40: "In that connection it must be observed that national legislative or judicial practices, even on the supposition that they are common to all the member-States, cannot prevail in the application of the competition rules set out in the Treaty. The same reasoning must apply with even greater force in relation to practices of private undertakings, even where they are tolerated or approved by the authorities of a member-State". (concerning resale price maintenance for books).
8. See Regulation 17/62/EEC, Article 3.
9. Sections 8(1) (goods) and 16(2) (services) RTPA 1976.
10. Sections 8(2), (3) (goods) and 16(3), (4) (Services) RTPA 1976.
11. See DGFT Annual Report (1979) p. 45.
12. Sections 6(1)(c) (goods) and 11(2)(b) (services) RTPA 1976.
13. Association of British Travel Agents [1984] I.C.R. 12 at p. 37C-F.
14. See DGFT Annual Report (1980) pp. 51, 52; DTI and OFT, Guidelines on the Operation of the Restrictive Trade Practices Act 1976 (September 1984) Annex C para. 4.
15. Schedule 2(a)-(e) Unfair Contract Terms Act 1977.

16. See e.g. No. S.161 Register of Restrictive Trade Practices, British Tugowners Association Standard Terms and Conditions (Section 21(2) dispensation given in 1984); for other judicial utterances see, Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827 H.L. presumption that where no inequality exists reasonableness is prima facie assumed. See also, Walker v. Boyle [1982] 1 All E.R. 634; Green v. Cade Bros. Farms [1978] 1 Lloyd's Rep. 602.
17. Green v. Cade Bros. Farms, supra - farmers purchased seed potatoes from supplier under agreement limiting the latter's liability to the cost of the seed should it prove defective and not consequential loss based upon lost-profits. However, the farmers could have purchased seed at a slightly higher price which was certified and thus less likely to be defective.
18. See for an example, Peek v. North Staffordshire Railway (1863) 10 H.L.C. 493, 11 E.R. 1109.
19. No. S.161 Register of Restrictive Trade Practices.
20. For example the SFC excludes liability for inter alia: (i) damage of any description done by or to the tug or tender, or done to the hirers vessel, or done by or to any cargo or other thing on the hirers vessel or being loaded thereon; (ii) loss of the tug or tender or the hirers vessel or of any cargo or other thing on board or being loaded thereon; (iii) any claim by a person not a party to this agreement for loss or damage of any description whatsoever. These exclusions apply irrespective of whether the tugowner or his servant or agents at fault. Furthermore, the hirer, under the SFC, is obliged to indemnify the tugowner for any liability incurred by the latter. There exist additional exclusions covering such matters as loss or damage due to delay, or force majeure occurrences.
21. e.g. see the Tugowners Association Case (supra). Paragraph 2 of Schedule 1 of UCTA provides that inter alia, contracts of marine salvage or towage are excluded from the Act.
22. See, British Bottle Association's Agreement (1961) L.R. 2 R.P. 345 [1961] 1 W.L.R. 760 at p. 792.
23. [1984] 1 C.R. 13 at pp. 23 and 24.
24. It is believed that the OFT were considering appealing the judgment of the RPC to the Court of Appeal. However, they decided against this approach on the basis that whilst they might win on the substance at appeal the Court might reject the approach of the RPC to SFC's and this would have returned them to the earlier unsatisfactory position.
25. Sheffield Newspapers Cmnd. 8664 (1983) p. 56 para. 7.9. The MMC when considering their discretion under Section 84 Fair Trading Act 1973 to appraise the public interest in Competition Act 1980 cases stated: "That discretion is amply wide enough to allow the Commission to consider questions ... of the fairness or unfairness of the practice or any party's need to resort to it in order to defend his legal rights. In our judgment the intention is clear, that the [OFT] is to be concerned only

..... continued

25. continued
with the question whether the course of conduct restricts, distorts or prevents competition, not with any other question of the character of the conduct. The further question whether the conduct operates, or may be expected to operate against the public interest arises only at the subsequent stage of a reference to the Commission".
26. *ibid.*, at p. 56 para. 7.11.
27. See e.g. British Broadcasting and Independent Television Publications Ltd (The Publication of Programme Information) (13 December 1984) at p. 66 para. 8.28 where both the BBC and ITP complained that they could only present the central arguments before the MMC which, they complained, made the preliminary formal investigation by the OFT futile given that the MMC operates by way of complete reinvestigation.
28. IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20 at p. D30 para. 13.
29. Sugar Institute v. U.S. 297 U.S. 553 (1936).
30. *ibid.*, at p. 579.
31. *ibid.*, at pp. 578, 579.
32. FTC v. Cement Institute 333 U.S. 683 (1948) reversing 157 F. 2d 533.
33. 157 F. 2d 533 at p. 544
33. See 333 U.S. 683 at pp. 716 and 719.
34. Sugar Institute v. U.S. 297 U.S. 553 at p. 598 (1936) per Hughes C.J.
35. See, Economist, "Power Play by Congress" January 31, 1981.
36. Section 124(3) FTA 1973. See DGFT Annual Report (1980) pp. 50, 51.
37. See Woodroffe, Government Monitored Codes of Practice in the United Kingdom (1984) Journal of Consumer Policy 171.
38. No. 1077 Register of Restrictive Trade Practices (1984).
39. No. 588 Register of Restrictive Trade Practices (1984).
40. No. 4994 Register of Restrictive Trade Practices (1983).
41. See Woodroffe, *op. cit.*, at pp. 174-177.
42. [1973] C.M.L.R. D217, Third Commission Competition Report (1973) paras. 68, 69.
43. e.g. under a clause which imposes all risks on the supplier, a total exclusion clause benefiting the buyer might be an example. Ostensibly such a clause benefits the buyer. However, that party will pay for such benefits in the form of higher prices.
44. The OFT seem to consider this to be anti-competitive when in a collectively imposed context, see DGFT Annual Report (1979) p. 45.

45. Section 2(1) UCTA 1977.
46. No.S.161 Register of Restrictive Trade Practices, British Tugowners Association Standard Terms and Conditions. (1984)
47. As has been recognised by the Court of Appeal. See Alec Lobb Ltd. v. Total Oil [1985] 1 W.L.R. 173 at pp. 181-183 per Dillon L.J., and at pp. 188, 189 per Dunn L.J.
48. Support for this approach may be found in the decision in Woodman v. Photo Trade Processing Ltd. (Times Business News, June 20 1981) X purchased film from shop which displayed a notice limiting liability to the replacement cost of the film. X's film was ruined during development and he claimed damages. The action succeeded and £53 damages were awarded for disappointment (the film was of a friends wedding). The limitation clause was struck down as unreasonable under UCTA 1977 because the Court considered that the public should have been offered a choice - development of film under present arrangements at a low price or a more specialised service with better compensation at a higher price.
49. See, Ailsa Craig Fishing Co. v. Malvern Fishing Co. [1983] 1 All E.R. 101 at p. 105 per Lord Fraser; approved of in George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. [1983] 2 A.C. 803 - under the UCTA 1977 limitation clauses are not to be judged by the same exacting standards that are to be applied to exclusion clauses.
50. Section 4 UCTA 1977.
51. (1961) L.R. 2 R.P. 345 [1961] 1 W.L.R. 760 at p. 762, part of the reason for the highly critical tone may stem from the facts that: (i) purchasers were generally unaware of the clause; and (ii), it was not known to have been activated by the supplier and hence there was no justification for sustaining an outdated restrictive clause.
52. e.g. No. 3550 Register of Restrictive Trade Practices. Agreement between members of Spray Contracts Technical Committee (concerning indemnity under the Asbestos Regulations 1969 B.S.S. 3590/1963, and, B.S.S. CP. 299/1968).
53. At one time liability clauses were expressed in terms of so much per tonne entrusted to the bailee. Today such clauses are rarer given that inflation rates may render the rates per tonne unrealistic in quite short periods. The change to fixed sum liability clauses means that SFC's do not have to be varied quite so frequently.
54. A bailee has been defined as follows: "Any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to convey and apply the specific thing according to the directions antecedent or future of the other person." - Pollock and Wright, Possession, at p. 160.
55. e.g. No. S.5892 Register of Restrictive Trade Practices, Master Photographers Association. The Master Photographers Association SFC for use by photographers at weddings provided for a cancellation fee of "75% of the then current price of the minimum order specified in the schedule". This was amended so as to allow the actual percentage to be freely negotiated between photographer and client.

56. This was the example given by Lord Halsbury L.C. in Clydebank Engineering Co. v. Don Jose Ramos Isquierdo y Castaneda [1905] A.C. 6 at p. 10.
57. See Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. Ltd. [1915] A.C. 79 at pp. 87, 88 per Lord Dunedin. See generally, Treitel, The Law of Contract (1983) p. 748 et seq.
58. Though, if member of a trade association agree that they will all charge the same credit rates then this will be a registrable agreement under Sections 6(1)(c) or 11(2)(b) RTPA 1976. Almost certainly such an agreement will be unsuited to Section 21(2) treatment. See e.g. Sharman Newspaper Nos. S.1161 and S.1597 Register of Restrictive Trade Practices (1983) RPC condemned agreements whereby members of trade association agreed with the principal supplier on credit and discount rates to be accorded them. The rules in question provided that members would not obtain advertising services from the supplier of that service other than upon terms that an allowance of 10% be made where payment is effected by the last Friday of the month following invoice date.
59. See e.g. No. S 12 Register of Restrictive Trade Practices, Association of British Launderers and Cleaners (1977).
60. No. S.15 Register of Restrictive Trade Practices, Building Societies Association (1984) documents V 29 dated 25 November 1982, and, V 33 dated 2nd March 1983.
61. e.g. FEDETAB v. Commission (Cases 209-215, 218/78) [1981] 3 C.M.L.R. 134, [1980] E.C.R. 3125 at paras. 147-156 of the judgment - The setting by the manufacturers trade association of a two week period for payment of bills by customers was prohibited under Article 85(1). It made no difference that the agreement was inspired by the need to counter strong market pressure to the contrary from powerful chains of supermarkets. The U.S. Department of Justice (Antitrust Division) adopt a similar view - see South Water Market Credit Association (1984) Department of Justice Release (March 1 1984).
62. Notice concerning Agreements, Decisions and Concerted Practices in the Field of Co-operation between Enterprises, J.O. 1968 C75/3, [1968] C.M.L.R. D5.
63. ibid. II (2)(b). For U.S. cases adopting a similar position see Swift & Co. v. U.S. (1905) 196 U.S. 375 at p. 395; Cement Manufacturers Protective Association v. U.S. (1925) 268 U.S. 588 at p. 604.
64. Boycotts arranged via credit systems have been condemned as illegal in USA: Swift & Co. v. U.S. (1905) 196 U.S. 375; U.S. v. Alexander & Reid 280 Fed. 924 (S.D.N.Y. 1922).
65. See the dictum of the Court in United States v. Southern California Wholesale Grocers Association 7 F.2d 944 (S.D. Cal. 1925) at p. 948: "Certainly it would be in the interest of economy in the general business of distribution, both as affecting the dealer and the customer, that loss suffered through the non-payment of retailers' accounts, whether due to dishonesty of the [debtor] or his financial irresponsibility, and which would necessarily become a part of the overhead cost of distribution, should be saved."
66. e.g. No. 3669 Register of Restrictive Trade Practices, Aberdeen Fish Salesmen's Association (1974); No. 3089 Register of Restrictive Trade Practices, Nottingham and District Wholesale Fruit and Potato Merchants (1974).

67. For a detailed discussion of credit scoring see OFT Consultative Document, Credit Scoring (1982).
68. *ibid.*, at p. 3 para. 3.2.
69. *ibid.*, at pp. 8-10 paras. 4.6 - 4.9.
70. No. S.3669 Register of Restrictive Trade Practices (1974).
71. See Newspaper Publishers Association, Newspaper Society Periodical Publishers Association, Scottish Daily Newspaper Society, Association of Independent Television Companies Association DGFT Annual Reports (1979) p. 44, (1980) p. 48 - Media trade associations modified their credit rules so that they recommend to members that credit be allowed to listed advertising agencies who meet specified financial criteria and who comply with the British code of Advertising Practice.
72. No. S 636 Register of Restrictive Trade Practices (1983).
73. e.g. Zinc Producers Group [1985] 2 C.M.L.R. 108; Aluminium Imports from Eastern Europe O.J. 1985 L 92/1 (30 March 1985); Cimbel [1973] C.M.L.R. D167; GISA [1973] C.M.L.R. D125; Fine Paper [1972] C.M.L.R. D94; Italian Cast Glass [1982] 2 C.M.L.R. 61; ACS Chemiefarma v. Commission (Quinine Cartel) (Case 41/69) [1970] E.C.R. 661, and for Commission decision [1969] C.M.L.R. D41.
74. e.g. Sugar Cartel [1973] C.M.L.R. D65 (Commission decision). Market sharing is unlawful even if it only concerns defective goods or "seconds" - European Glass Manufacturers [1974] 2 C.M.L.R. D50.
75. Cementregeling Voor Nederland [1973] C.M.L.R. D149.
76. Preserved Mushrooms [1975] 1 C.M.L.R. D83; Deutsche Philips [1973] C.M.L.R. D241; WEA - Filipacci [1973] C.M.L.R. D43; Julien/Van Katwijk [1970] C.M.L.R. D43; Dutch Transport Underwriters Bull E.C. 10/76 para. 2111; Sand Pits Bull E.C. 11/76 para. 2119; Leopold-Kamei Bull E.C. 11/75 para. 2122.
77. e.g. Article 3(c), (f). But c.f. Transocean Marine Paint II [1974] 1 C.M.L.R. D11 where market sharing between small and medium sized undertakings enabled them to become more efficient and compete more effectively upon a concentrated world market. This was an exceptional case.
78. e.g. SNPE - Leaffield Engineering [1978] 2 C.M.L.R. 758.
79. e.g. IFTRA Rules for Producers of Virgin Aluminium [1975] 2 C.M.L.R. D20.
80. (Cases 29, 30/83) [1985] 1 C.M.L.R. 688 for Commission decision see [1983] 2 C.M.L.R. 285.
81. *ibid.*, at p. 704 per Advocate General Mme Rozès, and at p. 714 para. 35 per the Court.
82. See e.g. Opinion concerning the applicability of the Treaty of Rome to the Importation of Japanese products into the Community J.O. 1972 C111/13. See also the Commission's response to W.Q. No. 299/72, J.O. 1972 C138/54. See also, EMI v. CBS Gramophone (Case 86/75) [1976] 2 C.M.L.R. 235, [1976] E.C.R. 871 at p. 908.

83. e.g. Prym - Beka [1973] C.M.L.R. D250.
84. e.g. Supply and Sale of Liquid Milk to Shops DGFT Annual Reports (1983) p. 30 and (1984) p. 34 under the agreement parties: fixed prices and discounts to certain customers, fixed tendering levels for milk; restricted supply to certain customers; allocated milk rounds; and supplied milk to shops only in cartons or other non-returnable containers; British Reinforcement Manufacturers Association DGFT Annual Report (1982) pp. 32 and 98. Parties were the main UK producers of processed steel reinforcing bars for concrete structures. Under the agreement parties undertook: not to import reinforcing steel from non EEC countries; not to sell below an agreed floor price; to abide by the Association's rebate scheme; and, not to limit deliveries by reference to a formula governing individual market share.
85. Re Permanent Magnet Associations Agreement (1962) L.R. 3. R.P. 119. (1962) 1 W.L.R. 781.
86. Doncaster and Retford Co-operative Societies Agreement (1960) L.R. 2 R.P. 105; See also Betting Shops DGFT Annual Report (1984) p. 32 Parties to an agreement undertook to selectively close certain betting shops and, in other cases, not to compete with a specified distance of a closed betting shop. The OFT commenced proceedings before the RPC in respect of these agreements which were clearly designed to share markets between the parties.
87. No. 1577 Register of Restrictive Trade Practices, National Farmers Union (Unreported, RPC 1971). This was condemned as a restriction under Section 6(1)(c) RTPA 1956 (now RTPA 1976).
88. No. 7514 Register of Restrictive Trade Practices (1976).
89. The equivalent provision for services is Section 18(2) RTPA 1976.
90. [1975] I.C.R. 240, [1975] 1 W.L.R. 1018, noted Korah (1975) J.B.L. 238, Cunningham, The Fair Trading Act 1973 (Supplement 1978) at pp. 64-66.
91. The statutory provision in question was Section 7(2) RTPA 1956, this became Section 9(3) RTPA 1976.
92. [1975] 1 W.L.R. 1018 at p. 1029.
93. *ibid.*
94. [1984] I.C.R. 429 (Warner J. (presiding) was the former Advocate General at the European Court of Justice).
95. *ibid.*, at p. 437 approving the decision in Registrar of Restrictive Trading Agreements v. Schweppes (No. 2) (1971) L.R. 7 R.P. 336 (one of the forerunner to the Schweppes case discussed above). The actual joint venture agreement does not appear to have exerted serious anti-competitive effects. Had it been registered it might have been suitable for exemption under Section 21(2) RTPA 1976. Though, there could have been an effect on inter-state trade so as to activate EEC rules.
96. Nicholas - Vitapro [1964] C.M.L.R. D505; Reuter - BASF [1976] 2 C.M.L.R. D44; Nutricia [1984] 2 C.M.L.R. 165; Sedame - Precilec Eleventh Commission Competition Report (1981) p. 64 para. 95; Tyler - Linde Eleventh Commission Competition Report (1981) p. 65 para. 96; Mecaniver - PPG O.J. 1985 L35/54.

97. *ibid*, c.f. also BPCL - ICI O.J. 1984 L 212/1 at p. 6 para. 26.4.
98. *ibid*.
99. Thirteenth Commission Competition Report(1983)p. 72 para. 88.
100. [1976] 2 C.M.L.R. D44.
101. [1984] 2 C.M.L.R. 165 at p. 173 para. 28.
102. Tyler - Linde, Eleventh Commission Competition Report (1981) p. 65 para. 96, no formal decision issued.
103. Reuters - BASF [1976] 2 C.M.L.R. D44.
104. Sedame - Precilec, Eleventh Commission Competition Report (1981) p. 64 para. 95.
105. Mecaniver - PPG O.J. 1985 L35/54 at p. 57 para. 15.
106. [1976] 2 C.M.L.R. D44 criticised by Korah,(1977)J.B.L. 76 c.f. Kabelmetal's Agreement [1975] 2 C.M.L.R. D40 at p. D46. See paragraph 20 and Article 3(2) of Regulation 2349/84/EEC O.J. 1984 L219/15 on bloc exemption for patent licenses which also use the "entering the public domain" test for lapse of secrecy of know-how, see Chapter 13 for analysis.
107. See, Continental Can (Case 6/72) [1973] C.M.L.R. 199, [1973] E.C.R. 215.
108. e.g. Mecaniver - PPG O.J. 1985 L35/54 at p. 57 para. 17.
109. For some examples see: No. 5125 Register of Restrictive Trade Practices Solicitors Law Stationary Society Ltd. Oyez Publishing Ltd. Longman Group Ltd. and Longman Holdings Ltd. relating to the purchase by Longman Group Ltd. of the legal taxation and accountancy publishing business of the Solicitors Law Stationary Limited and of the trademark Oyez (1984); No. 5141 Register of Restrictive Trade Practices, Endolithic Co. and Bristol Coin Equipment Ltd. concerning the purchase by Bristol Coin Equipment Ltd. of 90% of the Share capital of Composition Billiard Ball Supply Company Ltd. (1984); No. S1422, Register of Restrictive Trade Practices, J.K. Edgley, W.A. Fraser, Westpool Investment Trust PLC concerning the sale of shares to finance further development of an aircraft, the Optica (1984). See further, No. 4037 Register of Restrictive Trade Practices, Teeside Times, Westminster Press concerning the sale of a free weekly advertising sheet known as the Tyneside Times. The agreement contains restrictions on both parties: The seller will refrain from competing with the buyer; the buyer will refrain from competing with the seller in areas in which he still operates.
110. See No. 4983 Register of Restrictive Trade Practices, Mills Marketing Services and Namasco Holdings, restrictions on seller extended to whole of the United Kingdom for a period of 5 years (1982). See also No. 5087 Register of Restrictive Trade Practices, Beaver Metals, Jacksons (Nuneaton) Ltd., Ian Fraser, James Jones (1984) concerning the sale to Beaver by Jackson of scrap and other metals obtained in the course of business at premises leased from Beaver. This agreement was not a sale of assets but contained a restraint on the lessee providing that, "the lessee shall not at any time within two years of the determination of the term hereby created or any continuation or renewal thereof carry on or be in any way engaged, concerned or interested in the business of a scrap metal dealer within a radius of five miles of the demised premises."

111. see e.g. No. S.1437 Register of Restrictive Trade Practices, Whitbread PLC, Integrated Leisure Ltd. and L.R. Philby, agreement concerning the management of a public house and discotheque. Agreement restricted manager, on leaving the employ of the Brewery Company, from competing for 1 year within a 1 mile radius, from employing any person who had been employed by the Brewery during the agreement; and, from disclosing any trade secret or confidential information which they acquired during the agreement until such time as the information becomes part of the public domain.
112. See e.g. MMC General Report on Collective Discrimination Cmnd. 9504 (1955) at p. 82 para. 234: "We have been impressed particularly by the effect of a binding and collective obligation in preventing manufacturers or distributors from experimenting and from trying out new or different ways of conducting their business. Such obligations create an undue rigidity which may affect the numbers and kinds of concerns engaged in a trade, the trading methods adopted by those established in the trade and the level of prices both generally and to different classes of buyers." This view was confirmed subsequently by the Liesner Committee in their Review of Restrictive Trade Practices Policy Cmnd. 7512 (1979) p. 18 para. 3.5. For the EEC view which is similar see, AEG- Telefunken v. Commission (Case 107/82) [1984] 3 C.M.L.R. 325, [1983] E.C.R. 315 at p. 3195, para. 37 of the judgment.
113. *ibid.*, at para. 37 of the judgment.
114. Regulation 83/83/EEC on bloc exemption for exclusive dealing, O.J. 1983 L173/1 Article 2(3); and, Regulation 84/83/EEC on bloc exemption for exclusive purchasing O.J. 1983 L173/5, Article 2(3). See Chapter 10 for details.
115. See Commission Explanatory Memorandum to the bloc exemptions (*supra*) O.J. 1983 C355/7 at para. 20: "Such clauses are unobjectionable if admission to the distribution network is based on objective criteria of a qualitative nature relating to the professional qualifications of the owner of the business or his staff or the suitability of his business premises, if the criteria are the same for all potential dealers, and if the criteria are actually applied in a non-discriminatory manner. Distribution systems which do not fulfil these conditions are not covered by the bloc exemption."
116. [1975] 2 C.M.L.R. D1 at paras. 38 and 42.
117. Notice concerning Agreements, Decisions and Concerted Practices in the Field of Co-operation between Enterprises O.J. 1968 C75/3, [1968] C.M.L.R. D5 at para. II(4). See e.g. Jernbranchen Thirteenth Commission Competition Report (1983) at pp. 86, 87 para. 131.
118. e.g. Raleigh OFT Report (27 February 1981), and MMC Report (1981-82) H.C. 67.
119. Section 6(1)(f), the equivalent section for services is Section 11(2)(e). See Doncaster and Retford Co-operative Societies Agreement (1960) L.R. 2 R.P. 105 on "areas or places".
120. This was apparently the presumption made by the RPC in ABTA [1984] I.C.R. 12. It is understood that both the OFT and ABTA accepted that Section 11(2)(e) covered premises restrictions.

121. [1984] I.C.R. 12.
122. *ibid.*, at p. 42 G, H.
123. *ibid.*, see also at p. 41H and p. 42A-C.
124. AEG- Telefunken v. Commission (Case 107/82) [1984] 3 C.M.L.R. 325, [1983] E.C.R. 3151 at p. 3195 para. 37 of the judgment.
125. O.J. 1985 L19/17 at p. 22 para. 20. See also Ideal - Standard O.J. 1985 L20/38.
126. See e.g. IBM Personal Computer [1984] 2 C.M.L.R. 342 at p. 343 para. 6.
127. Regulation 83/83/EEC on bloc exemption for exclusive dealing O.J. 1983 L 173/1; Regulation 84/83/EEC O.J. 1983 L 173/5 on bloc exemption for exclusive purchasing. See Chapter 10 for details.
128. IBM Personal Computer [1984] 2 C.M.L.R. 342 at p. 344 para. 4.
129. IAZ International Belgium SA and Others v. Commission (Cases 96-102, 104, 105, 108, 110/82) [1984] 3 C.M.L.R. 276 at para. 20 of the judgment.
130. "Worker" is defined as "... a person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise, be express or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour."
131. Though discrimination of sex and race grounds may infringe anti-discrimination laws on those issues .
132. [1984] I.C.R. 12, but c.f. ABTA No. 2 [1985] I.C.R. 123 where the RPC pronounced on a revised set of rules submitted by the parties for approval.
133. *ibid.*, at p. 51D.
134. *ibid.*, at p. 51E.
135. See, on Section 9(3), Registrar of Restrictive Trading Agreements v. Schweppes (No. 3) [1975] I.C.R. 240, [1975] 1 W.L.R. 1018 at p. 1029; and, Diazo Copying Materials [1984] I.C.R. 429 at p. 437.
136. [1985] I.C.R. 123.
137. See e.g. No. 983 Register of Restrictive Trade Practices, Mills Marketing Services, Namasco (1982). See also No. S 1437 Register of Restrictive Trade Practices, Whitbread and Co. PLC, Integrated Leisure Ltd. and L.R. Philby (1984), in this agreement the covenantor who was to manage commercial premises of the company agreed not to poach employees of the company after the end of the management contract.
138. See Cunningham, The Fair Trading Act 1973 (1974) pp. 192, 193 at para.12.10.

139. Notice concerning Agreements, Decisions and Concerted Practices in the Field of Co-operation between Enterprises, J.O. 1968 C75/3 [1968] C.M.L.R. para. 7. For cases see Eurogypsum [1968] C.M.L.R. D1; Wild-Leitz [1972] C.M.L.R. D36; ASBL [1970] C.M.L.R. D31. A similar position is taken by the U.S. Department of Justice Antitrust Division. In January 1984 they stated, in a business review letter to the National LP-Gas Association (NLPGA) that they would not object to the institution of a general fund to promote the use of propane as an automotive fuel through national advertising. The letter stated, inter alia, "Through a jointly funded advertising campaign, NLPGA hopes to increase sales of propane and propane-related equipment by increasing consumer awareness of propane as an alternative engine fuel. This may have the pro-competitive effect of stimulating competition with other forms of engine fuel and related equipment. Due to the expense of national advertising, it is unlikely that any one manufacturer or distributor could afford to advertise extensively enough to achieve this result." (Department of Justice Release, Jan. 6 1984).
140. Belgian Wallpaper [1974] 2 C.M.L.R. D102.
141. See Commission answers to W.Q. 1081/82, O.J. 1982 C333/11; and W.Q. 2097/82, O.J. 1983 C219/1. For an advertising case under Article 86 EEC, see Sacchi (Case 155/73) [1974] 2 C.M.L.R. 177, [1974] E.C.R. 409 at p. 430 - T.V. station which discriminates in respect of advertising station based on nationality of advertiser would abuse Article 86. See also Boat Equipment Tenth Commission Competition Report (1980) p. 82 paras. 119, 120.
142. Commission v. Ireland (Buy Irish Campaign) (Case 249/81) [1983] 2 C.M.L.R. 104.
143. See the U.S. case of NLPGA supra (Department of Justice Release, Jan. 6 1984). The NLPGA was an industry-wide trade association which funded national advertising for propane. The Department of Justice in a business review letter stated: "Financing for the Fund is to be by voluntary contributions from participating N.L.P.G.A. members and from consumers. Direct contributions to the Fund will be made by equipment manufacturers and distributors who will contribute one-tenth of 1 per cent of their annual gross sales, and propane tank manufacturers who will contribute 25 cents each unit sold. In addition, equipment distributors and tank manufacturers will each collect a one dollar voluntary contribution from purchasers of carburetion units and propane tanks. These contributions from consumers would be effectuated by adding one dollar to the cost of each carburetion unit and propane tank sold and designating this charge on the invoice with the label 'Engine Power Promotional Fund'. A letter explaining that the contribution is voluntary is to accompany each invoice." The Department of Justice had no objections to this method of collection.
144. e.g. Cecimo [1969] C.M.L.R. D1; Cematax [1973] C.M.L.R. D135, exemption renewed O.J. 1983 L 140/27 (and notice under Article 19(3) of Regulation 17/62, O.J. 1983 C 20/2); UNIDI [1975] 2 C.M.L.R. D51 exemption renewed [1985] 2 C.M.L.R. 38; EUMAPRINT Bull E.C. 1973 para. 2108; SMMT [1984] 1 C.M.L.R. 611; and, BPICA [1983] 2 C.M.L.R. 40.
145. See SMMT [1984] 1 C.M.L.R. 611 and see also various earlier versions of the agreements in question which the Commission objected to No. S.1083 Register of Restrictive Trade Practices (1984) document V.5. (letter January 1985) Commission refused exemption until SMMT removed clause preventing members from exhibiting during years when there was no show planned.

146. UNIDI No. 2 [1985] 2 C.M.L.R. 38 at p. 41 para. 10.
147. BMW [1975] 1 C.M.L.R. D44 (Commission decision).
148. IBM Personal Computer [1984] 2 C.M.L.R. 342 at p. 346 para. 10(4).
149. See Regulation 83/83/EEC, on bloc-exemption for exclusive dealing O.J. 1983 L173/1 Article 2(2)(c).
150. *ibid.*, Article 2(3)(c). See also Regulation 84/83/EEC on bloc-exemption for exclusive purchasing O.J. 1983 L 173/5 Article 2(3)(d).
151. *ibid.*, Article 2(3).
152. e.g. Krupps O.J. 1980 L 120/26 at p. 28 para. 15 advertising restrictions technically within Article 85(1) but are excluded on a de minimis basis.
153. No. S.571 Register of Restrictive Trade Practices (1977) - Code approved by the Department of the Environment. See, for other examples: S.1399 Register of Restrictive Trade Practices. British Wood Preserving Association. Association rules prohibit door to door canvassing by members unless prior notification of the visit has been given in writing through the postal system and agreed by the occupier of the property. Associations seeking to curb what are considered as exploitative, pressure methods of selling will probably be acting in the consumers favour. Such a rule is restrictive in that it hinders aggressive selling strategies which may differentiate the vigorous from the non-vigorous company. See also No. S.1280 Register of Restrictive Trade Practices, Association of Air Courier Services. Association sought, inter alia, to prevent misleading adverts. This is probably not a restriction at all since an obligation to comply with the ordinary law (i.e. on misleading and deceptive advertising) cannot be viewed as "restrictive". The Association also required members to ensure that their advertisements complied with the standards of external bodies e.g. Advertising Standards Authority; Code of Advertising Practice Committee; Independent Broadcasting Authority; Independent Television Company Authority, and, Association of Independent Radio Authorities. An obligation to abide by widely held standards does not restrain a firm's freedom to select the form or substance of adverts. The restriction would rarely be considered significant.
154. No. S 657 Register of Restrictive Trade Practices, Society of Catering and Hotel Management Code of Ethics, (1980).
155. An interesting example of restrictive advertising of legal services occurred in the USA. The Department of Justice, Antitrust Division, sent letters in September 1984, to the Chief Justices of the highest judicial courts in 40 States in connection with the adoption of the American Bar Association Model Rules of Professional Conduct provisions of fees, solicitation and advertising. These Courts were in the process of adopting the rules. The rules contained restrictions, inter alia, on lawyers initiating communications with prospective clients either in person, over the telephone or by mail except in defined and limited circumstances. The Antitrust Division commented cautiously that the rules could be useful in protecting the public from over-zealous lawyers but added that they could restrict the flow of "useful information to consumers of legal services". They added that the rule banned communications to those most in need of legal assistance. The Antitrust Division were also critical of

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155. continued ...

rules restricting the communication of fields of practice and specialisation. They stated: "Such information would assist consumers in deciding which lawyers they may wish to approach about providing a particular legal service and which lawyers they prefer not to consider. In general there is no apparent reason for prohibiting dissemination of truthful information about lawyers efforts to specialise or even claims of specialization since such communications contain useful consumer information and reduce search costs.

156. Nos. 1161 and 1597 Register of Restrictive Trade Practices(Unreported Judgment of RPC, 1984).
157. No. S.1083 Register of Restrictive Trade Practices (1984) in respect of the EEC exemption reported at O.J. 1983 L. 376/1.
158. See e.g. No. 3798 Agreement between the Members of the Federation of Mushroom Spawn Suppliers and the Mushroom Growers Association (1981), concerning a levy to provide funds for central publicity. The levy was raised by means of a proportional increase in the prices charged to grocers.
159. e.g. No. S.202 Register of Restrictive Trade Practices Agreement between Organisations representing advertising agencies and media-owning companies to fund the Advertising Standards Authority through a surcharge set and administered by the Advertising Standards Board of Finance (1979).
160. e.g. MMC Report on the supply of Frozen Foorstuffs for Human Consumption H.C. 674 (1976) at paras. 326-332; MMC Report on the Supply of Cigarettes and Tobacco H.C. 218 (1961).
161. (January 1983).
162. (July 1983).
163. (October 1981).
164. Cmnd. 8664 (1983).
165. (October 1984).
166. See MMC Report on Supply of Household Detergents H.C. 105 (1966) para. 97 - MMC concluded that free gifts can distort competition by artificially creating demand in a manner unrelated to product quality. See Scottish Universal Newspapers Ltd. (January 1983) OFT investigation under CA 1980. OFT recognised that practices connected with introduction of a new product or service may be anti-competitive (ibid., at p. 39, para. 8.16). On the relationship between advertising by dominant concerns and entry barriers see Scherer, Industrial Market Structure and Economic Performance (1980) at pp. 375-405 esp. at pp. 390-393.
167. Notice concerning Agreements, Decisions and Concerted Practices in the Field of Co-operation between Enterprises O.J. 1968 C 75/3 [1968] C.M.L.R. Article 8. See ASBL [1970] C.M.L.R. D31, VVVF [1970] C.M.L.R. D1. (quality label coupled to sales restrictions operating outside of the EEC).
168. ASBL supra; VVVF supra.

169. *ibid.*
170. ASBL [1970] C.M.L.R. D31 at p. D33 para. 10.
171. *ibid.*
172. Transocean Marine Paint I [1967] C.M.L.R. D9, Transocean Marine Paint II [1974] 1 C.M.L.R. D11.
173. ASBL [1970] C.M.L.R. D31.
174. Transocean Marine Paint I [1967] C.M.L.R. D9. See generally, Baden-Fuller, Economic Issues Relating to Property Rights in Trademarks: Export bans, Differential Pricing, Restrictions on Resale and Repackaging (1981) E.L. Rev. 162.
175. See e.g. Belgian Wallpaper (Case 73/74) [1976] 1 C.M.L.R. 589, [1975] E.C.R. 1491 at p. 1513 (trade mark association, joint vertical price-fixing).
176. See Article 2(3)(b) Regulation 83/83/EEC, O.J. 1983 L 173/1 on bloc-exemption for exclusive dealing; and, Article 2(3)(c) Regulation 84/83/EEC, O.J. 1983 L 173/5 on bloc-exemption for exclusive purchasing.
177. See e.g. No. S.15 Register of Restrictive Trade Practices, Building Societies Association BSA 1984 Document V55 dated 8 March 1985. The BSA in a circular (No. 3056) to Members recommended adoption of a Code of Practice on common standards for advertising of deposits and shares. The code was jointly drafted with, inter alia, the British Bankers Association. In the circular the BSA state: "The principal object of the code is to ensure that when the composite rate arrangements are also applied to banks and other financial institutions, advertisers use a common terminology to describe the various types of rates on offer in printed advertisement. This will assist consumers in making comparisons between advertised rates and avoid the confusion that would result from the different use of different terms to describe the same variable." The OFT did not obtain Section 21(2) dispensation for the code since the BSA were registering too many circulars on a regular basis to give the OFT a chance to assess the overall impact of the recommendations. However, in a letter to the BSA, the OFT indicated that in their view the code was unlikely to contain any significant restrictions. See also: No. S.5166, Register of Restrictive Trade Practices, Soap and Detergent Industry Association Agreement on increasing fill levels. In 1977 the Department of Prices and Consumer Protection encouraged development of an express agreement on fill levels of heavy duty fabric washing powder packed in "E sizes" (soap and synthetic). The parties agreed on the current weights of different categories of heavy duty fabric washing powder used in the home (e.g. Tide, Surf, Omo, Radiant) Section 21(2) dispensation given (1984); No. 4681, Register of Restrictive Trade Practices, Interlocking Paving Association. Agreement specified a minimum manufacturing standard against which members would negotiate contracts for pre-cast paving blocks. The agreement was designed to provide a common standard in the absence of the approved BSI standard which was still under consideration. The agreement did not in any way impinge on members discretion as to price or terms and conditions. Section 21(2) dispensation given (1984); No. 4883, Register of Restrictive Trade Practices, The Tea Council Catering Tea Grading Scheme (1982). Agreement between members of the Tea Council concerning graded tea sold in bags. The Council promulgated a Code of Practice under which members would regulate the weight of tea in each

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177. continued ...
- tea bag and would label tea bags according to the quality of the tea enclosed. A system of stars (1 star plain tea, 2 stars medium tea, 3 stars quality tea) would be used. The Council would supervise and enforce the standards of tea of those members who wished to comply with the Code.
178. Health based justifications for restrictions are expressly provided for under Sections 10(1)(a) (goods), and, 19(1)(a) (services) RTPA 1976. However, these grounds can only be argued before the RPC.
179. No. 3769 Register of Restrictive Trade Practices (1974). See also, No. 4868 Register of Restrictive Trade Practices, British Aerosol Manufacturers Association. Members subscribed to a code of practice concerning the standards for the content, labelling and performance of aerosols containing more than a certain amount of flammable material, and standards and procedures for long term storage testing of new or modified aerosol products. Section 21(2) dispensation given (1983).
180. See British Waste Paper Association (1963) L.R. 4 R.P. 29 at p. 50. See also British Furniture Manufacturers Federated Association (1966) L.R. 6 R.P. 185 an agreement containing a restriction on members copying the designs of other manufacturers was not a restriction upon the "descriptions" or "kinds" of goods to be supplied; Blanket Manufacturers Agreement (1959) L.R. 1 R.P. 208, association recommendation that members should not produce blankets of less than a certain quality was a restriction on the "descriptions" or "kinds" of goods to be purchased.
181. e.g. SCVB v. Kerpen & Kerpen (Case 319/82) [1985] 1 C.M.L.R. 511; Cementhandelaren (Case 8/72) [1973] C.M.L.R. 7; [1972] E.C.R. 977; European Sugar Cartel (Sucker Unie) (Cases 40-48, 50, 54-56, 111, 113, 114/73) [1976] 1 C.M.L.R. 295, [1975] E.C.R. 1663.
182. See Commission Notice pursuant to Article 19(3) of Regulation 17/62/EEC Kathan Biocide O.J. 1984 C59, noted Fourteenth Commission Competition Report (1984) p. 66 para. 73. See also Distillers-Victuallers O.J. 1980 L 233/4 (4 September 1980) end-user restrictions given negative clearance because they did not appreciably effect inter-state trade.
183. Article 2(2)(c), O.J. 1983 L 173/1.
184. See Commission Explanatory Memorandum O.J. 1983 C 355/7 para. 17.
185. Benzine en Petroleum Handelsmaatschappij v. Commission (Case 77/77) [1978] 3 C.M.L.R. 174, [1978] E.C.R. 1515; Boat Equipment Bull E.C. 1/80 para. 2118; Polaroid/SSI Europe Thirteenth Commission Competition Report (1983) p. 95 paras. 155-157.
186. Commercial Solvents (Cases 6, 7/73) [1974] 1 C.M.L.R. 309, [1974] E.C.R. 223.
187. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429, [1978] E.C.R. 207 at p. 298.
188. As occurred in Benzine en Petroleum Handelsmaatschappij v. Commission (Case 77/77) [1978] 3 C.M.L.R. 174, [1978] E.C.R. 1513.

189. In the Benzine case *ibid.* BP rationed fuel amongst its customers giving priority to regular contractual customers, secondly to regular non-contractual customers, and lastly to periodic non-contractual customers. ABG a Dutch joint purchasing co-operative fell into the last category of customer and was accordingly refused supplies of its normal requirements. The European Court, overturning the Commission's decision (for which see [1977] 2 C.M.L.R. D1, Third Commission Competition Report (1973) pp. 23-25, Fourth Commission Competition Report (1974) pp. 17-19), decided that the system set up by BP was justifiable and not an abuse of dominance.
190. e.g. Hugins/Liptons [1978] 1 C.M.L.R. D19 overturned on appeal to the European Court for lack of an appreciable effect upon inter-state trade (see (Case 22/78) [1979] 3 C.M.L.R. 345, [1979] E.C.R. 1869).
191. European Sugar Cartel (Suker Unie) (Cases 40-48, 50, 54-56, 111, 113, 114/73) [1976] 1 C.M.L.R. 295, [1975] E.C.R. 1663 at p. 2004. (Supplier sold denatured sugar as fodder for animals only and not for consumption by humans).
192. United Brands v. Commission (Case 27/76) [1978] 1 C.M.L.R. 429, [1978] E.C.R. 207 at p. 295.
193. e.g. Doncaster and Retford Co-operative Societies Agreement (1960) L.R. 2 R.P. 105.
194. [1984] I.C.R. 429.
195. No. S.1179 Register of Restrictive Trade Practices. Section 21(2) dispensation not given at time of writing though it is understood that there are serious objections to the recommendations.
196. No. 3775 Register of Restrictive Trade Practices (1976)
197. No. S.256 Register of Restrictive Trade Practices (1976).
198. See e.g. C.R.A.M. v. Commission (Cases 29, 30/83) [1985] 1 C.M.L.R. 688.
199. See e.g. Raleigh (February 1981) OFT Investigation, for MMC Report see H.C. 67 (1981-82).
200. See generally, MMC General Report into Full-Line Forcing and Tie-In Sales H.C. 212 (1981); Posner, Antitrust Law, An Economic Perspective (1976) pp. 171-184; Scherer, Industrial Market Structure and Economic Performance (1980) pp. 582-584.
201. See U.S. Department of Justice Vertical Restraints Guidelines (January 23, 1985 para. 5.(1) where the Department of Justice argue that an exclusionary effect can only arise where the tying is accompanied by exclusive dealing or other forms of vertical integration which operate to solidify the exclusionary effect.
202. See Sherer op. cit., at pp. 582, 583: "Suppose, for instance that one copying machine user makes 3,000 copies per month, while another makes 10,000 copies per month. It would be difficult for a company selling only copying machines to price its machines in such a way as to extract more revenue from the more intensive user. But if the machine maker can tie the purchase of special copying paper to the purchase of its machines, and if it can wield sufficient leverage in the paper market to realize a supra normal profit margin there, it will be able to secure additional profits from the high volume user".

203. See U.S. Department of Justice, Vertical Restraint Guidelines (January 25, 1985) para. 5.1: "One pro-competitive use [of tying] is to protect the integrity or reputation of a product. Where the manner in which purchasers use a product may affect a manufacturers reputation and future sales, the manufacturer may ensure that the purchaser maintains desired standards by tying the sale of the product to a maintenance contract or to sales of 'approved' parts, and thus reduce the risk of inferior service by distributors."
204. *ibid.*, at para. 5.1.
205. Regulation 83/83/EEC on bloc-exemption for exclusive dealing O.J. 1983 L 173/1; and, Regulation 84/83/EEC on bloc-exemption for exclusive purchasing O.J. 1983 L 173/5, Article 2(3)(a) of both Regulations.
206. Article 3(c) Regulation 84/83/EEC *supra*. See Chapter 10 for analysis.
207. See Commission answer to W.Q. 1865/83, O.J. 1984 C 152/12 and 13.
208. Hoffman-La Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461 at para. 111 of judgment; See IBM Settlement [1984] 3 C.M.L.R. 147; GEMA I [1971] C.M.L.R. D 35. (customers of GEMA, a copyright Society had to pay a royalty fee for uncopyrighted material as well as copyrighted material; this was an abusive extension of power over copyrighted material to unprotect material).
209. [1984] 3 C.M.L.R. 147, see also IBM v. Commission (Case 60/81) [1981] E.C.R. 2639 at p. 2642.
210. No. S.15 Register of Restrictive Trade Practices (1984); See also DGFT Annual Report (1976) at pp. 87, 88, and, MMC General Report into Full Line Forcing and Tie-In Sales H.C. 212 (1981) at pp. 27-29 para. 9.1 - 9.13. See the view of the European Commission on this case, answer to W.Q. No. 1965/83, O.J. 1984 C 152/12. See also DGFT Annual Report (1982) p. 102 Halifax Building Society agreed that it would no longer insist on its borrowers taking out property insurance through the Society.
211. No. S.15 Register of Restrictive Trade Practices (1984), see circular 1940 and see also Document V.4 dated 7 December 1978 Circular 2233.
212. *ibid.*, Document V.9 dated 19 August 1976 Circular 2038 at paras. 10. The circular stated: "It is often contended that the sharing of endowment commission is justified because building society funds not only make the mortgage possible but also make the sale of the endowment policy possible, that being the real justification for entering the commission sharing arrangement with the broker. Where a broker has already arranged an acceptable policy for an applicant independent of and prior to the mortgage application, the Society should not normally expect a share of the commission."
213. The public interest arguments in respect of the retention of insurance agency (that would have been relevant had the OFT referred the case to the RPC) appear to have been, For: (1) continuity and adequacy of cover is assured and the method of payment is convenient for the mortgagor; (2) the coverage of risk is good and the Societies bargaining power has enabled them to negotiate improvements from time to time without increasing premiums; (3) usually the settlement of claims can be handled expeditiously

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by local offices of a Society and insurance companies who know the standard policies; (4) administrative scale economies because of block handling of policies may be realised which, along with profits from commission, benefit members of the Society. Against: (1) brokers have special skills and act independently in the best interests of their clients and can therefore give attention to the characteristics of individual properties and to local conditions; (2) insurance of some properties can be better and more cheaply covered by individual treatment; (3) a borrower should be free to limit the insurance arranged via the agency of a Society to the amount of the loan outstanding, insuring the balance of the value of the property where he can obtain the best terms (rather than have to insure to the full replacement value of the property). See MMC General Report, op. cit., at para. 9.11).

214. [1985] I.C.R. 167. See No. 4620 Register of Restrictive Trade Practices, Mail Order Association Code of Practice (1979) Clause 13 of Code ban on tying of cost of free gifts into cost of main item.
215. (10 October 1984) Though the OFT have informally investigated tying practices. During 1984 they investigated the practice of some landlords in requiring lessees to accept insurers nominated by them, or even in forcing sitting tenants to change to insurers nominated by the landlord. The landlords earned commission in introductions to insurers. See Commission answer to W.O. 1865/83. O.J. 1984 C 152/12. See also Austin Rover Corrosion Warranty DGFT Annual Report (1984) pp. 107, 108.
216. *ibid.*, at p. 47 para. 7.10.
217. *ibid.* at pp. 47-50 paras. 7.11 - 7.16. The MMC also seem to have adopted a de minimis approach on occasion, see the Report on Supply of Electrical Equipment for Mechanically Propelled Land Vehicles H.C. 21(1983) MMC did not condemn a very informal form of full line forcing whereby the supplier would negotiate with the buyer on the basis that discounts attached to purchases of ranges of products rather than single products. The tie was very loose and was not apparently considered to have exerted a more than minimal effect (see *ibid.*, at para. 998).
218. e.g. MMC Report on the Supply and Processing of Colour Film H.C. 1 (1966). Practice of supplying film on a processing paid basis was condemned. The tying of the film to the processing service erected considerable entry barriers to rival providers of processing services; MMC Report on the Supply of Barristers Services H.C. 512 (1975), Practice whereby a Queens Counsel could not appear without a junior was criticised by the MMC; MMC Report into Supply of Films for Exhibition in Cinemas H.C. 206 (1966), MMC critical of the tying of support films to main feature films.
219. H.C. 212 (1981).
220. *ibid.*, at pp. 44, 45 para. 13.33.
221. Indeed, the U.S. Department of Justice seem to consider that tying is really only a problem in the context of exclusive dealing or other forms of vertical integration, See Vertical Restraints Guidelines (January 23, 1985) para. 5.1. See for a U.K. example, MMC Report on the Supply of Petrol to Retailers in the United Kingdom H.C. 264 1965.

CHAPTER 12

JOINT VENTURES AND CO-OPERATION AGREEMENTS

A. INTRODUCTION

In this chapter the following is examined:

- Section B: Legal framework - analysis of the views of the Commission and the OFT towards joint ventures.
- Section C: Joint selling ventures - analysis of agreements whereby competitors agree in order to sell on a combined basis.
- Section D: Joint purchasing - analysis of agreements whereby purchasers combine to effect purchases. Such agreements may enable small purchasers to increase their bargaining power when confronted with larger sellers
- Section E: Joint research and development - agreements to pool R & D resources are increasingly common. This section examines the EEC bloc-exemption, and the UK cases under Section 29 RTPA 1976 as well as criteria under Section 21(2) RTPA 1976.
- Section F: Specialisation - analysis of the EEC bloc-exemption and of UK treatment under Sections 21(2) and 29 RTPA 1976.
- Section G: Rationalisation agreements - agreements whereby competitors reduce capacity in an orderly manner so as to alleviate structural over-capacity in an industry are becoming increasingly common. Analysis of treatment under EEC and UK law and consideration of tax and state aid aspects under UK law is also given.
- Section H: Product standardisation - analysis of agreements to manufacture or otherwise produce to identical or similar specifications.
- Section I: Joint carriage ventures - analysis of agreements designed to realise scale economies in transportation.

B. LEGAL FRAMEWORK

Competition law, of necessity, adopts a pragmatic view of joint ventures. Some are beneficial, others are detrimental to the market. Joint ventures are essentially structural devices to support some other form of activity by parties. Hence each case must be assessed on its merits and these will vary according to the type of co-operation in question.

I. EEC Law¹

(i) Structural Considerations

Joint ventures effect the structure of a market: Five firms control between them 80% of the market, two of these firms, X and Y, control 15% and 28% respectively. X and Y form a joint venture company - XY Ltd. - to produce and sell the relevant product, they agree not to individually compete with the joint venture company. The market structure has now changed. Four firms control 80% of the market and one of these firms - XY Ltd. - control 43% which may well be enough to turn it into the market leader.

It follows from the fact that joint ventures are evaluated primarily by reference to their economic effect and not their legal form that restrictions on competition may arise not only from express contractual provision but also from the mere existence of the joint venture and of the economic inter-relationship of the parents and parties. This chapter examines a wide range of different venture types; as will be seen the relevant considerations may differ according to the type of the agreement and its function.

(ii) Economic Consequences

Joint ventures may have consequences which bring them within the scope of Article 85(1) EEC.

- (a) Joint ventures which sell the parent companies products or services to third parties inevitably distort competition between the parents. Even where the parents retain some selling freedom and the joint venture sells only a percentage of their goods or services, competition between the parents is distorted. In such cases there is a natural tendency for the parents to harmonise their prices with those of the joint venture.²
- (b) Where the joint venture provides goods or services to the parents, for example, research results or components for the parents

manufacturing process, then there will be a tendency for the parents to align their prices. Clearly where the parents R & D or other input costs are identical then the overall price will tend to be similar. This will particularly be the case where the goods or services provided by the joint venture represent a high percentage of total costs since, in such cases, the percentage of overall cost attributable to the individual parents own efforts will be small compared to the percentage of overall cost attributable to the joint venture.

- (c) Where the joint venture supplies its parents needs for a particular good or service this will operate as a barrier to those firms who hitherto had supplied the parents with the good or service.
- (d) Where the joint venture sells to third parties and is not in competition with the parents then the very existence of the joint venture might deter the parents from individually entering the market.³ Though, in many cases the parents may be incapable [for technical or financial reasons] of independent market entry.
- (e) Where the joint venture is between oligopolistic companies it may deleteriously alter the structure of the market by increasing overall concentration and by discouraging market entry.⁴
- (f) Where the joint venture has taken over the operations of one or other of the parents this may indicate an unwillingness by the parents to compete, though it could also indicate an inability of one or both of the parents to remain in business alone.
- (g) Joint ventures may simply be structural umbrellas beneath which the parents may align their policies. Such concertation between the parties almost inevitably activates Article 85(1) EEC. Horizontal restrictions between the parties⁵ inter se are always scrutinised carefully by the Commission

Joint ventures may also have pro-competitive consequences which render them suitable for exemption under Article 85(3) EEC⁶:

- (a) Joint ventures may facilitate the penetration of a market increasing competitiveness therein whereas independently the parents would have been technically incompetent to achieve penetration or at least would have been considerably less efficient at penetration. This is particularly so where the parents combine complementary technology or expertise in a joint venture.⁷
- (b) Joint ventures may lead to improved or novel technology where they combine the R & D capacity of two undertakings, again this is

especially true where the parents couple complementary skills together in the joint venture. Advent of new technology helps make the industry more efficient and may benefit the consumer if it improves the product or service and/or increases choice.

- (c) Joint ventures may enable the parents to overcome the financial risks of market entry or sale of advanced technology, a shared risk is per se a minimised one. Again, the joint venture may be the only way that the parents can effect entry.
- (d) Joint ventures may be the only ways in which the manufacture of an intermediate product used by both parents may be placed upon a profitable footing. The joint venture by maximising scale economies will reduce the parents costs which in turn may be passed on to the consumer.⁸

To be suitable for exemption the joint venture must not eliminate competition in respect of a substantial part of the products in question. Thus, the effectiveness and extent of the residual competition will be a relevant factor in assessing a joint venture. In this respect ease of entry to the market will be a relevant factor, if new firms can enter the market with ease the threat of potential entry may operate as a disciplining factor on existing participants, including any joint ventures.

(iii) Rules for termination of joint ventures

Article 85 applies to rules governing the termination of joint ventures. Whatever the reason for the termination the parties may only accept restrictions on competition which do not, either in geographical extent or duration, go beyond what is necessary for the orderly dissolution of the joint venture and to allow the parties a reasonable possibility of establishing themselves as independent undertakings in competition with each other.⁹

In one case¹⁰ R and N were producers of starch. In 1984 R purchased the shares of N in joint ventures which had been operated by the parties since 1962. From 1984 the parties would gradually begin to compete together. Amongst the terms of the agreement terminating the joint ventures were contained the following types of clause designed to allow N to redevelop capacity and attract custom:

- (a) Clauses restricting the extent to which the parties, for a period of between 6 and 9 months, competed with each other in their respective primary marketing areas. These clauses gave the parties a short period of grace in which to establish themselves.

- (b) Clauses granting N exclusive distribution rights of the joint venture product produced by R in the former territories of the venture. This enabled N to establish contact with customer and commercial know-how. These rights were of 2 years duration.
- (c) Clauses whereby N supplied R with the relevant product for 18 months at preferential rates.
- (d) Clauses restricting the parties from using the name of the other party with 6 months exceptions for the disposal of existing stocks.
- (e) Clauses granting licenses of between 4 and 10 years for use of the trade marks previously used by the joint venture.
- (f) Clauses whereby the parties grant non-exclusive licences to each other for the patents and know-how formerly used by the joint venture.

The Commission accepted that these restrictions were necessary for the orderly dissolution of the venture and the re-introduction of competition between the parties. They settled the case on the basis of a comfort letter which stated that the restrictions gave no reason for action pursuant to Article 85(1) EEC.¹¹

(iv) Joint ventures and Article 86

Article 86 may apply where a joint venture reinforces the dominance of the parties on the market or where it artificially creates a dominant undertaking where one did not hitherto exist. The European Court has on a number of occasions stressed the relevance of protecting market structure:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."¹²

Elsewhere the Court has stated,

"... Article 86 covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on trader's performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market."¹³

The Commission, to date, has not actively used this structural approach to joint ventures though they have used it in the context of proposed mergers which are analogous cases to joint ventures (albeit that joint venture entail only partial integration of productive facilities). The Court, in respect of mergers, has stated that it is an abuse if the merger leads to an "... alteration to the supply structure which seriously endangers the consumer's freedom of action on the market"¹⁴ It follows that some joint ventures may infringe Article 86, irrespective of the behaviour of the parties, thus reinforcing the view that "abuse" under Article 86 covers not only exploitative conduct but also conduct that is per se neutral vis-a-vis competitors but indirectly harmful to consumers because of its impact upon structure.

(v) Co-operation Agreements

X and Y who are competitors might decide to co-operate. However, rather than incorporate a joint venture company they agree to make their own facilities available to each other. Thus X and Y co-operate in R & D with personnel from Y working in laboratories owned by X. The criteria for assessing such co-operation is essentially the same as it is for joint ventures in which X and Y incorporate a jointly owned company XY Ltd.¹⁵

(vi) Summary of relevant principles: Actual and potential competition

In assessing the impact of a joint venture all relevant factors will be considered including not only existing competition but also potential competition i.e. could the parties potentially compete together.¹⁶ In assessing actual and potential competition the Commission consider that the following questions are pertinent:

- (a) Input of the joint venture: Does the investment expenditure involved substantially exceed the financing capacity of each party? Does each party have the necessary technical knowledge and supply sources of input products? If parties are financially and technically able to operate independently it may be questioned whether a joint venture is strictly necessary.
- (b) Production of the joint venture: Is each party familiar with the process technology? Does each party itself produce inputs for or products derived from the joint venture's product and does it have access to the necessary production facilities? Where parties have the necessary production capacity and technology again the economic necessity of a restrictive agreement may be questioned.

- (c) Sales by the joint venture: Is the actual or potential demand such that it would be feasible for each of the parties to manufacture the product on its own? Does each have access to the necessary distribution channels? Again, where the answer is yes, the necessity of joint sales may be questioned.
- (d) Risk factor: Could each party bear the technical and financial risks associated with the production operations of the venture alone? Again, where the answer is yes, the necessity of the joint venture may be questioned.

The above factors will apply differently in different cases. However, they are all designed to test whether the justifications for the joint venture outweigh the restrictions on competition the venture entails.

II. United Kingdom Law

Surveys undertaken by the European Commission suggest that joint venture activity within the EEC is largely set in a national framework.¹⁷ In the United Kingdom the OFT and the Department of Trade and Industry (DTI) regularly encounter joint ventures of different types. There are two principal means of control of joint ventures in the UK. First, under Section 21(2) RTPA 1976 and, secondly, under Section 29 RTPA 1976.

(i) Registrability under the RTPA 1976

Many joint ventures and co-operation agreements are subject to the RTPA 1976.¹⁸ There must be at least two parties carrying on business in the UK.¹⁹ Thus, if a UK firm agrees with an American firm the agreement is not registrable. If the UK firm and the American firm incorporate a jointly owned subsidiary in the UK the agreement will be registrable since there will be two parties carrying on business in the UK, the parent and the joint subsidiary.²⁰ In this respect parents are considered as separate legal entities from their subsidiaries (though a joint venture company in which the parents hold equal shares (50%) can not be said to be a subsidiary of either since neither controls it). If the RTPA 1976 does not apply because only one party carries on business in the UK, it will become applicable if another party commences business in the UK. If the parties are desirous of avoiding registration they might incorporate a clause in the agreement providing that the agreement is terminated in the event of two or more parties commencing to carry on business within the UK. Though, as will be shown later

in this Chapter many joint ventures obtain Section 21(2) clearance and hence registration need not necessarily be feared.

To be registrable the joint venture agreement must contain restrictions of a type listed in Sections 6(1)(a)-(f) (goods), or, 11(2)(a)-(e) (services) (discussed in Chapter 1).

If X and Y form a joint venture company - XY Ltd. - and agree not to compete with it this will be registrable under Sections 6(1)(f) (goods) or 11(2)(e) (services) RTPA 1976 as an agreement containing restrictions on, "the persons or classes of persons to ... whom ... goods are to be supplied" If X and Y agree not to compete with XY Ltd. they will have to refuse to supply customers who come to them for the product rather than to XY Ltd. This might also be a restriction under Section 6(1)(d) (for goods) as a restriction on the "quantities or descriptions" of goods to be produced or supplied. If X and Y refrain (or partially refrain) from competing with XY Ltd. they are restricted as to the quantities of goods they produce and/or the descriptions (i.e. kinds) of goods they produce.

Often joint venture agreements contain a clause requiring the parents to refer to the joint venture company all enquiries and orders concerning the joint venture activity and goods or services. Such a clause necessarily restricts the parents as to the persons or classes of person to whom they may supply goods. Variations on this theme, for instance where the parents are restricted from supplying the joint venture good or service only where the board of the joint venture company so decides are also registrable.²¹

An agreement between X and Y as to the prices the joint venture company will charge is registrable, under Sections 6(1)(a) or 11(2)(a) RTPA 1976 as restrictions on the prices to be charged, quoted etc. Where X and Y agree as to the terms and conditions on which the joint venture company will trade this is registrable under Section 6(1)(c) or 11(2)(b) as restrictions on terms and conditions of trade. If X and Y agree that the joint venture company will only produce 10,000 tonnes or a specified number of a product then this will be a restriction as to the quantities of goods to be produced or supplied under Sections 6(1)(d) RTPA 1976 or, where the agreement regulates the extent or scale of services to be supplied by a joint venture, Section 11(2)(c) RTPA 1976. If X and Y agree that the joint venture company will limit its production to specified kinds of goods leaving the parents to produce and supply other kinds of goods then this is a restriction under Section 6(1)(d)

as to the "descriptions of goods to be produced".²² These examples are of course not exhaustive of the restrictions that render joint ventures registrable.

(ii) Avoiding registration

Where it is considered desirable to avoid registration parties will have to refrain from accepting restrictions listed in Sections 6(1) and 11(2) RTPA 1976. Thus, if X and Y wish to institute a joint venture company to manufacture a component they both need then they would have to avoid the following: (a) clause preventing parents from competing with the joint company in production of the component; (b) clause requiring joint company to supply parents on preferential terms and conditions; (c) clauses restraining joint company's right of free action. Where the parents do not consider it worth while to incorporate a joint venture without such restrictions then it must be registered. Failure to register renders restrictions in the agreement void and unenforceable in a Court of law thus permitting a party to breach the agreement with impunity.²³

(iii) Clauses not registrable

Certain clauses in a joint venture may be disregarded when registrability is being considered according to Sections 9 (goods) and 18 (services) RTPA 1976. Principally, terms relating exclusively to the goods or services supplied may be disregarded. Thus, where X and Y both supply goods or provide services for the joint venture company these may be disregarded. For example X might supply goods at cost price or may agree to provide training services for the staff of the joint venture. Y might provide accounting facilities or secretarial assistance. Agreements between X and Y to provide these goods or services are thus to be disregarded.

An agreement between X and Y to license know-how or trade marks or other intellectual property to the joint venture company does not count as an agreement for the supply of goods or services so is outside the scope of the RTPA 1976.²⁴ Restrictions on use of the parent licensors intellectual property rights are not legally counted as restrictions so are exempt from the Act.²⁵ The same conclusion applies to licenses granted by a joint venture company to the parents even though the licenses contain restrictions on use.

Following the decision of the RPC in Diazo Copying Materials²⁶ certain restrictive clauses in agreements between parties to

co-operation agreements will be disregarded under Sections 9(3) and 18(2) RTPA 1976 when registration is being considered. In that case HTL and MSL entered an agreement under which HTL would manufacture using MSL know-how in addition to its own a new type of photocopying machine and MSL would market, on an exclusive basis, the product throughout the world. This was subject to a non-exclusive, non-assignable right granted to HTL to retain the product and make other disposals of it in the UK. The OFT considered that HTL had accepted a restriction not to sell the product in countries other than the UK. This would make the agreement registrable under Section 6(1)(f) RTPA 1976 (restriction "on areas or places ... in ... which, goods are to be supplied ..."). The RPC held that this negative obligation on HTL was within Section 9(3) and hence to be disregarded as a term relating exclusively to the goods supplied. It follows from this case that if X and Y wish to jointly manufacture a product and subsequently to limit the selling area of one of them then they may avoid creating a registrable agreement by granting one of the parties an exclusive distribution right subject to a non-exclusive right to sell in a specified area granted to the other party. By this device a market-sharing arrangement between the parties drafted as an agreement granting one party the exclusive right to sell anywhere but subject to a non-exclusive right granted to the other party to sell in a geographically limited area escapes registration. It is uncertain how far the rule in Diazo Copying Materials extends. The decision of the RPC might have been coloured by the fact that had the clause been registrable HTL would have been in contempt of court for breaching an earlier order of the RPC restraining HTL from enforcing any other unregistered agreement. Given that the actual restriction appears to have exerted a minimal effect on competition the RPC might have felt ill-disposed to holding HTL in contempt of court. A second reason for exercising caution over the decision is the decision of the RPC in Association of British Travel Agents ²⁷ in which the RPC held that Section 18(6) (and a fortiori Section 9(6)) which allows restrictions on employees to be disregarded when considering whether an agreement is registrable did not operate to exempt terms that had an obviously restrictive effect. If this were applied to Section 9(3) or 18(2) RTPA 1976 then it would severely curtail their usefulness as exempting provisions. A final point on the Diazo Copying Materials case concerns the fact that HTL was only restricted from competing with MSL outside of the UK. Within the UK there

was no restrictions on competition between the parties and hence it is difficult to see that the RTPA 1976 could have applied since Schedule 3 paras. 6(1) and 9(1) RTPA 1976 exempts from the Act agreements having "overseas operation" only. This point seems to have been overlooked by the RPC.

One final clause type that is worth noting is the procurement clause whereby X and Y agree that XY Ltd. (the joint venture company) should perform certain tasks. Often in joint ventures the parents, X and Y, agree with XY Ltd. that the latter will perform certain activities e.g. in respect of preparing documentation or in obtaining tax relief. It would seem unlikely that XY Ltd. has accepted any registrable restriction although he has covenanted to act in a specific way and hence his freedom is curtailed. Likewise neither X nor Y have accepted registrable restriction. A more difficult case is where X and Y agree with XY Ltd. that X shall procure a subsidiary controlled by X to supply specified services or goods to XY Ltd. Has X accepted a restriction under the Act? It is possible that X has accepted an implied negative restrictions under Sections 6(1)(f) (goods) or 11(2)(e) (services) on the persons who may be supplied i.e. X has restricted his freedom to supply XY Ltd. in favour of a subsidiary. However, the better view is that X has not accepted a registrable restriction since under the agreement X has no inherent right to supply XY Ltd. and is merely agreeing to facilitate supply by another person

(iv) Joint Ventures and Section 21(2) RTPA 1976

Joint ventures are appropriate to Section 21(2) treatment. In assessing whether a restriction is significant or not the OFT take account of three main factors:

- (a) Minimum restrictiveness: The restriction should be the minimum necessary to enable the parties to attain the objectives of their agreement. Thus the liberty of the parties to sell independently of the joint venture company must be limited only to the extent necessary to enable the joint venture company to market the contract product or service with greatest efficiency. Thus if X and Y agree not to compete in sales of the contract product with their jointly owned company XY Ltd. for 15 years when it is economically reasonable to expect that XY Ltd. will achieve successful market penetration with the contract product within 8 years then the non-competition clause may be "significant". If X

and Y agree not to compete with XY Ltd. in respect not only of the contract product or service but also in respect of other products or services that have not been the subject of joint R & D then this will be a significant restriction. An agreement whereby X and Y refrain from competing with XY Ltd. is also implicitly a negation of competition between X and Y. Hence if the non-competition clause applies to products or services other than those the subject of joint R & D then the clause unjustifiably restrains competition between X and Y and is excessive in relation to the objectives of the agreement i.e. R & D and exploitation of a new or improved product.

(b) Extent of residual competition: The OFT assess a restriction in the light of the extent of residual competition from competing products or from products which are substitutes on the market. Thus, a definition of the product market is an essential part of Section 21(2) analysis. The following examples give an indication of how this test may be applied. In each case X and Y have jointly incorporated a company - XY Ltd. - whose shares they hold in equal part. XY Ltd. conducts the business of the agreement:

- X and Y are not competitors but combine complementary abilities and technological skills to produce a new or improved product or service. Since neither X nor Y could individually have created the product or service the agreement has enhanced competition by adding something to the market that would not otherwise have emerged. The agreement might hence intensify existing competition or create a new product market.
- XY Ltd. provides joint transport facilities for X and Y thereby reducing their carriage costs and ultimately their overall cost. The agreement hence enables X and Y to compete more effectively against larger rivals. The agreement intensifies competition between X and Y, and, other companies.²⁸
- XY Ltd. undertakes R & D and marketing of a product that improves upon those manufactured individually by X and Y. XY Ltd. sells in a market dominated by oligopolists. The agreement by enhancing competition with oligopolists helps to protect the market structure against the development of conscious parallelism amongst the oligopolists which might harm the consumers interests.²⁹
- XY Ltd. undertakes joint R & D and marketing and becomes, through its efforts, the dominant supplier in the UK. However it is

subject to intensive competition from EEC and other international firms. Individually X and Y would at the time of the agreement have experienced difficulty in competing with the international competition, collectively they are able. This is a more difficult case under Section 21(2). The agreement may well create a dominant firm with regard to the UK market, the agreement between X and Y not to compete inter se or with XY Ltd. negates the potential for X and Y to individually compete on the UK market in the future. However by forming a joint venture X and Y have intensified competition on the international market and in so doing may indirectly benefit UK consumers by adding to the choice of products and helping keep prices down. Whether Section 21(2) dispensation applies may depend upon the extent to which the OFT accept that international competition, which may not have a bearing on the UK market, is an adequate disciplining force on XY Ltd. in its sales to the UK market i.e. international competitors are able to supply the UK market should XY Ltd. prove inefficient or overprice its product or service etc. In practical terms X and Y would have to consider the implications of EEC law and if necessary notify their agreement to the Commission. Where X and Y obtain bloc-exemption (see Section E below) this should suffice to secure favourable OFT treatment. Alternatively X and Y might consider applying for exemption from registration under Section 29 RTPA 1976 on the basis that the agreement is important to the UK economy. Section 29 RTPA 1976 exemption does not effect the need to notify the agreement to the Commission.

- X and Y in incorporating XY Ltd. create a monopolist in the UK and a dominant supplier in the world. This might be the case for a new high-technology product where XY Ltd. is the innovator and seeks to obtain worldwide patent protection for its invention. Individually X and Y might have failed to create the new product. Time might be of the essence where the first company to produce the product can create entry barriers for rivals in the form of intellectual property rights. Such an agreement negates competition between X and Y who are clearly important firms in the UK technically capable of undertaking their own R & D. Restrictions in the agreement, e.g. a non-competition clause, would appear to be significant. However the joint venture may well be appropriate for Section 29 RTPA 1976 treatment. Clearance with the Commission would also be necessary.

(c) Detriment to third parties: The interests of the consumer or user are always relevant in determining the "significance" of a restriction.³⁰ Users and customers are interested in as wide a choice of products or services as possible and in competitive prices and terms and conditions. Consumer choice can suffer where X and Y stop competing with each other to create XY Ltd. However, where XY Ltd. creates a new or improved product then the consumer may have benefited. Clearly, where X and Y do not compete but combine complementary skills to create something new or improved then the consumer enjoys added choice i.e. the new/improved product or service. Where XY Ltd. jointly manufactures a component used by X and Y separately in their own manufacturing processes the consumer can benefit because the scale economies realised by X and Y through joint production of a component may be passed on to the consumer in low prices. Where the component accounts for a high percentage of total cost such that there is a tendency for X and Y to align their final selling price on the basis of common costs a greater problem arises and the extent to which competition to X and Y exists will be an important indicator of the pressures on X and Y to respond to the market generally rather than to each other. In some markets especially for high technology or complex products price may not be the central ingredient of competition, pre and post-sales levels of service may be crucial. In these markets the natural alignment of prices between X and Y might not be a hindrance to Section 21(2) provided that X and Y compete in non-price matters.

(v) Pending Registration and severance clauses

It is customary in joint venture containing registrable restrictions to include a clause which provides that, "No provision of the arrangement constituted by this agreement and any related understandings between the parties which is such as to make it liable to registration under the Restrictive Trade Practices Act 1976 shall come into effect until the day after that on which particulars thereof are duly furnished to the Director General of Fair Trading in accordance with the said Act." It will be recalled that restrictions in unregistered agreements are void and unenforceable³¹ and any party who suffers damages as the result thereof may bring action for damages in respect of the agreement.³²

Additionally, it is not uncommon for agreements to contain severance clauses whereby the parties specify that if the restrictions in the agreement have not been cleared by the relevant authorities (formally, the Director General of Fair Trading) by a specified date then the agreement shall take effect as if the restriction therein were deleted.³³ Such a clause is really only useful in respect of restrictions that parties do not consider essential.

(vi) Section 29 RTPA 1976: Agreements important to the national economy

The Secretary of State, advised by the DTI, may exempt from registration any agreement that is considered to be of importance to the national economy under Section 29 RTPA 1976. Four cases have been exempted by this provision, all of them were joint ventures. Three of the cases have received exemption since 1982.³⁴ Detailed analysis of the wording of Section 29 is given in Chapter 2 Section B. There are no limits to the type of agreement that benefit from Section 29, although, as noted, all agreements to date have been in joint venture form. To be considered important to the national economy agreements will probably have to be involved in a new high-technology field, or be in a field of activity in which the Government considers it important to have active UK corporate participation. There is little doubt but that certain agreements registered in normal fashion under the RTPA might have benefited from this provision. The advantage of Section 29 is that it allows the parties to keep restrictions in their agreements that might have had to be deleted if the parties had wanted to benefit from the Section 21(2) procedure; Section 29 does not provide that only agreements whose restrictions are not "significant" may obtain exemption. Another advantage is that the DTI give priority to Section 29 agreements and decisions on them may be given within weeks; the "waiting period" under Section 21(2) is rarely less than 6 months for even the most innocuous agreements and may well run to years. It should not be overlooked that agreements of a size likely to benefit from Section 29 exemption will almost certainly have to be cleared with the European Commission under Article 85 EEC.

Cases on Section 29 RTPA 1976 are discussed throughout this Chapter.

(vii) Mergers and joint ventures

Technically, some joint ventures may qualify as mergers within the meaning of the Fair Trading Act 1973. Where X and Y combine their respective capacities and facilities in a joint venture such that one or

other or both of the parties ceases to be distinct then the Secretary of State might be able to refer the joint venture/merger to the MMC under Section 64 FTA 1973. Where X and Y, however, create a new joint venture company so that no enterprise "ceases to be distinct" no reference may be made. In practice the merger provisions are not used to regulate joint ventures. Though the merger provisions are relevant in considering rationalisation agreements. See Section G below.

C. JOINT SELLING VENTURES

Where parties agree to pool their collective selling resources through a single selling agency which has the exclusive right to sell the goods and set prices then competition between the parties as to price may be negated. Such agreements are rarely permissible. Where the central agency does not set the prices and where parties are not bound to sell exclusively via the central agency then the anti-competitive potential is minimised and the relevant authorities may treat the venture sympathetically. Where a joint selling agency is instituted as a means of obtaining fair negotiating terms with a dominant purchaser (nationalised industry, joint-purchasing consortium, monopolist etc.) then the attitude of the authorities is harder to predict. There is certainly scope for exemption in such cases.

I. EEC Law

(i) Under Article 85(1) EEC

Joint sales agencies which have the exclusive right to export the members products to the EEC and to set selling prices will invariably be prohibited under Article 85(1).³⁵ It is immaterial that the joint sales venture will effect only a very small percentage of the target market especially where that market is oligopolistic or where the exporters are oligopolists on their own market or where excess capacity exists.³⁶ Article 85(3) will hence be given in exceptional cases only. In the past the Commission has exempted cases where the joint agency sold exclusively on the national market and/or on markets outside of the EEC but where the parties retained freedom to sell on the remainder of the EEC market.³⁷ However, more recently the Commission has taken the view that a joint sales agency which concentrates upon the domestic market can, nonetheless, affect trade between the Member States so as to activate Article 85(1) EEC.³⁸ This will particularly be the case where the parties hold substantial market shares and through the joint agency

may exert a dominant influence on pricing in the market which non-nationals may feel loathe to disturb for fear of a price war. The Commission contend that the size and solidarity of national producers has a direct bearing on foreign producers willingness to export to that State.³⁹

Joint sales agencies which seek to combine competitors "in a syndicated" or "complete" fashion by regulating sales patterns will infringe Article 85(1) with no chance of exemption. Thus attempts to allocate quotas to the members,⁴⁰ or operate equalisation of receipts schemes,⁴¹ or limit the development of new capacity amongst members, or require members to notify each other when they intend to increase output etc. will be prohibited under Article 85(1).⁴³ Furthermore, the Commission is unlikely to exempt an agreement between competitors to use each other as sales agencies.⁴⁴

(ii) Exemption under Article 85(3) EEC, Negative clearance.

Few agreements to harmonise sales efforts will be suitable for exemption. Joint selling ventures which operate only outside of the EEC do not fall within Article 85(1). Though they might if they are sold subject to a ban on reimportation to the EEC in which case Article 85(1) may apply if the ban effects a significant number or amount of the products.

Joint sales ventures between small firms may obtain exemption where their combined market share is small, probably under 10% of the total market, and where the joint venture enables the parties to compete more effectively with larger competitors. Such cases are probably not even within Article 85(1) since they enhance rather than diminish overall competition or at least have only a minimal effect on competition. It will be relevant to ask whether the parties could have exported without the assistance of the joint venture. Only in exceptional cases will joint sales ventures which export be exemptable under Article 85(3).

Where however the parties to the joint venture are not in direct competition with each other then the joint venture will generally be lawful.⁴⁵ In the Commission Notice on Co-operation the Commission have confirmed this view that consortia of non-competing firms set up for the joint execution of orders do not restrain competition.⁴⁶ By non-competing the Commission means firms which will not in the foreseeable future compete with regard to the products or services involved in the consortia. Where the parties do compete they may nonetheless enter the

agreement where they are otherwise unable (for lack of experience, specialized knowledge, capacity or finances etc.) to execute the order at all or in time or in accordance with the specified requirements. There may however be a restraint of competition if parties agree only to work within the consortia and to curtail their independent activities.

II. United Kingdom Law

(i) Registrability

Joint sales agreements are registrable under Section 6(1)(d) RTPA 1976 as restrictions in respect of the quantities of goods to be acquired by the joint venture.⁴⁷ Where X and Y and Z agree to sell exclusively via a joint agency this will be a restriction under Section 6(1)(d) RTPA 1976 as to the quantities (i.e. 100%) to be supplied and perhaps under Section 6(1)(f) RTPA 1976 as to the persons or classes of person to be supplied since the parties by selling exclusively to the joint agency impliedly accept negative restrictions on selling to other persons. Where the parties agree to sell only a percentage of output via the agency this, again, is a restriction under Section 6(1)(d) and Section 6(1)(f) RTPA 1976 in so far as the parties are limited in their ability to sell to other persons. Where the agency sells on common terms and conditions this would be a restriction under Section 6(1)(a) and (c) on prices and terms and conditions.

(ii) Dispensation under Section 21(2)

Where the joint selling agency is a vehicles for producers to align selling prices and terms and conditions it will be inappropriate for Section 21(2) treatment and the OFT will probably refer the agreement to the RPC. Where the parties sell through the agency as a means of reducing transport costs but accept no restrictions as to the amount of product they sell via the agency or as to the prices and terms and conditions on which they sell then there should be no problems under Section 21(2).⁴⁸ This is particularly so where the parties are small or medium sized and where scale economies are passed on to consumers. It might well be possible to draft such agreements so as to avoid registration where the parties do not accept restrictions on quantities, prices or terms and conditions. It may be restated that agreements need only be registered where two parties accept restrictions. Thus, if X and Y incorporate XY Ltd. as a joint selling agency and in the tripartite agreement between X, Y, and, XY Ltd. only XY Ltd. accepts

restrictions then the agreement is not registrable.

Where X and Y combine complementary skills and technologies to jointly research produce and sell a product Section 21(2) dispensation may well be available. Thus in Water Injection and Treatment Agreement,⁴⁹ BP Trading Ltd. and Plenty Group Ltd. incorporated Oil Plus Ltd. as a joint venture company to produce and market a water injection and treatment package for use in enhanced oil recovery from oil reservoirs. The joint company thus combined Plenty's experience in water filtration and treatment and BP's technological expertise and know-how relating to enhanced recovery of oil from oil reservoirs by means of water injection. One of the clauses of the agreement restricted the parents from competing with the joint venture for a 5 year period subject to Plenty's right to meet the specific filtration requirements of any third party and subject to a right for either parent to supply where a customer bona fide desired the services of a particular parent and not the joint venture. The joint venture was occasioned primarily because neither party had the overall skills to effectively provide the treatment and filtration services. Hence, in the absence of the agreement the services and related products might not have been produced. In such cases exclusive sales rights (albeit limited to a number of years) are reasonable adjuncts to the joint production.

Joint tendering agreements whereby X, Y and Z combine to tender for the supply of goods and/or services may benefit from Section 21(2). Such agreements are distinct from collusive tendering cartels whereby X, Y and Z agree as to the prices at which they will all separately tender. Thus in Taylor Woodrow Construction - Co-operative Wholesale Society - William Steward⁵⁰ the parties agreed to combine forces to tender for supply of goods and services in connection with construction work. The parties possessed different areas of expertise in general building work, mechanical services, and, electrical services. The agreement effectively precluded the parties from making individual tenders but this restriction did not operate where either the joint tender failed to materialise or failed to succeed. Given that the agreement combined complementary expertise and that in the absence of the agreement the parties might have been unable to effectively provide the goods and services sought by the buyer the restriction was considered insignificant. Indeed, the agreement may have enhanced competition by enabling an additional tender to be added to those already existing.

(iii) Exempt agreement under Schedule 3(6) and (9) RTPA 1976: Export Agreements

Agreements containing restrictions which have overseas operation exclusively are not within the scope of the RTPA 1976 under Schedule 3 paras. (6) and (9) RTPA 1976. These provisions are discussed in Chapter 2 Section M. The agreement need not per se be exclusively concerned with exports; any restrictions therein must be. By virtue of Section 25 RTPA 1976 export agreements to which Schedule 3 paras. (6) and (9) apply must be registered on a non-public register. This registration duty is for the Governments administrative convenience, no legal consequences attach to failure to register. In practice the duty is often flouted.

The Schedule 3 paras. (6) and (9) exemptions have very limited value since an export agreement affecting the EEC will be subject to Article 85(1) EEC which applies strictly to joint export ventures (see above); it's only use may be in respect of sales outside of the EEC though these sales should not be accompanied by bans on resale back to the EEC since this might influence the EEC market and render the agreement subject to Article 85 EEC.

(iv) Joint selling and Section 29 RTPA 1976: Agreements important to the national economy

A number of agreements involving joint production and marketing have been exempted under this provision. These are dealt with in more depth in the Section on R & D. In Rolls-Royce and GEC⁵¹ the parties combined the complementary talents of Rolls-Royce in the manufacture of gas-turbine engines and of GEC in the manufacture of generating sets to produce gas turbine generating sets. These are electricity generators that operate independently of a national grid and have considerable export potential. They may be used, for example, in heavy engineering or other operations located in areas remote from organised power sources (deserts, oceans etc.). Rolls-Royce and GEC jointly developed the product through a joint venture company which had the exclusive right (subject to certain exceptions) to sell the joint product. In Agricultural Biotechnology⁵² an agreement in the field of agricultural biotechnology providing for joint R & D and subsequent marketing was given a five year exemption under Section 29. The agreement was important to the national economy in that it enabled UK firms to actively participate in a highly specialised market considered to be of future importance.

In System X⁵³ an agreement between British Telecommunications (BT), Plessey (P), and, GEC was exempted from registration under Section 29. Unlike the other agreements this did not involve joint R & D upon which was appended joint marketing and supply. This agreement concerned the planned and co-operative supply of improved telephone exchange equipment to BT for use in the new System X telephone systems. Under the agreement GEC and P shared supplies on an ordered basis for a specified period prior to the resumption of full competitive tendering by GEC and P for supply contracts to BT. In the note prefacing the heads of agreement the parties stated: "BT is considering a revised programme of modernisation and is accordingly examining the practicability of accelerating the rate of development, manufacture and introduction of System X. It is the objective of the parties to this Agreement to achieve changes in the procurement and supply of System X to allow more effective production of equipment in higher volumes at lower cost, with progressively improved features and facilities. This would permit GEC and Plessey to achieve their aim of expansion of export activity".

This joint supply agreement was in reality a market sharing agreement between GEC and P and hence registrable under Section 6(1)(d)RTPA1976 as a restriction on quantities to be supplied (i.e. GEC and P divided supplies to BT between them). The agreement was exempted under Section 29. A number of reasons may be advanced for this. First, the agreement was only temporary pending the reintroduction of competitive tendering between GEC and P. Secondly, the agreement covered a transitional period in the development of System X during which BT was seeking to accelerate the introduction of System X. Thirdly, the installation of System X is a nationwide operation the efficiency of which directly effects consumers and users of telephone services. Fourthly, the technology and products in question have very significant future export potential as other European states privatise telecommunications and open their markets to foreign technology and suppliers.⁵⁴ There may have been a fifth reason in this particular case in that the UK government did not wish BT to have to face defending a lengthy and potentially reputation damaging defense of the agreement before the RPC shortly prior to (or even during) the sale of its shares to the public in 1984.

D. JOINT PURCHASING

Joint purchasing is not treated the same as joint selling. It may be justified as a means whereby small and medium sized buyers join forces to either negotiate collectively with a dominant supplier or purchase in greater quantities so as to earn greater discounts which **can** then be passed on to consumers. The acceptability or otherwise of joint buying venture will depend largely upon circumstances.

I. EEC Law

The Commission have issued fewer decisions on joint purchasing than on joint selling. Though they have made it clear that parties must retain freedom to buy direct from suppliers i.e. they must not agree to buy only via the purchasing agency.⁵⁵ More specifically the parties should retain the liberty to purchase about 75% of their requirements from other suppliers of their choice.⁵⁶ If the parties, in exercising their discretion as to suppliers, thereafter decide independently to purchase a high percentage of their needs from the agency this is apparently acceptable.⁵⁷ Parties should not restrain their freedom as to the prices and terms and conditions upon which they resell the goods purchased from the agency.⁵⁸ Nor should parties accept restrictions on purchasing from other Member States, such a restriction would amount to a serious infringement of Article 85(1) EEC.⁵⁹

It follows from the above that joint purchasing is perfectly acceptable where contractually the parties retain buying and selling independence from the agency. Though buying independence may be limited by up to 25%. In every case the respective purchasing power of each individual party to the agreement must be examined. Where parties are economically powerful enough to obtain favourable buying terms from suppliers the Commission doubts the need for a joint venture.⁶⁰ Conversely, where the parties even collectively are small (i.e. between 1 and 5% of total demand is affected by the venture) and the joint venture enables them to obtain quantity discounts which may be passed on to customers then negative clearance may be available on the basis that the agreement has an imperceptible impact upon inter-state trade.⁶¹ Alternatively, where the parties combined have a significant degree of market power exemption under Article 85(3) may be available where the agreement enables the parties to negotiate reasonable terms with dominant suppliers.⁶²

II. United Kingdom Law

(i) Registrability under the RTPA 1976

Group purchasing agreements are common in the grocery market and elsewhere. They frequently involve registrable restrictions. Common clauses which will lead to activation of the RTPA 1976 are as follows:

- (a) recommendations made by the joint agency (often a trade association) as to the prices to be charged for goods covered by special promotions and/or its "own brand" goods are registrable under Section 6(1)(b) as restrictions on prices to be recommended or suggested as to the prices to be charged on resale of the goods supplied. These recommendations are common in joint purchasing organisations in the grocery field where members are recommended to charge specified prices for lines of goods marked as "promotions" or "own brands";
- (b) geographical selling restrictions on wholesalers: Where the joint agency restricts its wholesaler members from supplying or otherwise sponsoring retailers outside of a defined area or from supplying or otherwise sponsoring two or more retailers who would be in direct competition with each other then this is a restriction under Section 6(1)(f) RTPA 1976 on the persons or classes of persons to whom goods are to be supplied;
- (c) minimum purchase requirements: Clauses requiring members (wholesalers or retailers) to purchase minimum requirements (e.g. 50% of total demand) from the joint agency entail restrictions under Section 6(1)(d) RTPA 1976 on the quantities of goods to be acquired;
- (d) clauses restraining members from joining any other buying group constitute restrictions under Section 6(1)(f) RTPA 1976 on the persons or classes of person from whom goods are to be acquired;
- (e) Quotas: Clauses allocating quantities purchased by the group to members according to a formula which is not necessarily related to the members actual needs is a restriction under Section 6(1)(d) RTPA 1976 on the quantities of goods to be acquired by the members;
- (f) restrictions on use or sale of product: Clauses limiting the uses to which members may put the purchased product, for example, requiring members to use the product for their own needs and prohibiting them from reselling it may constitute a restriction under Section 6(1)(c) on the terms and conditions subject to which

goods are to be acquired (i.e. product can be purchased on condition that it is by user and is not resold). It may also be a negative implied restriction under Section 6(1)(f) i.e. as a restriction on the persons or classes of person to whom the goods are to be supplied since the own-use/resale ban clause impliedly prevents sale to other persons;⁶³

- (g) ban on sales to public: Clauses in agreements concerning "cash and carry" wholesalers prohibiting direct sale to the public are restrictions under Section 6(1)(f) RTPA 1976 on the persons or classes of person to whom goods may be supplied.

(ii) Dispensation under Section 21(2) RTPA 1976

The OFT have given a number of dispensations from reference to the RPC under Section 21(2). Though in some cases clauses have had to be deleted or modified in order to render the agreement suitable for Section 21(2) treatment. Thus in Land Mark Cash & Carry⁶⁴ the Group purchasing agency required members to feature for a two week period products as promotions when the agency notified the product to the wholesaler member. The agency in this period would undertake national promotion of the product. The OFT required the agency to modify the mandatory element in the rules so that members were not in future required to promote or feature the notified product. The OFT were also concerned to ensure that certain aspects of the scheme did not operate restrictively. Thus they required the agency to give an assurance that clauses in the code of practice providing for the provision of information on sales volumes and types to the agency by members and also providing that a member would notify the agency when it intended to expand or extend its operations, were not being used to facilitate the exchange of price information and policies or as a means of regulating the commercial expansion of members. Ultimately, Section 21(2) RTPA 1976 dispensation was given.⁶⁵

Recommendations by the agency as to prices for promotions or own-brand goods are usually appropriate to Section 21(2) treatment. Though, the recommendation should not bind members nor should members be informed that, though technically free to make their own pricing decisions, they are expected to comply with the recommended price. Ideally, the recommended price should be in the form of a maximum price below which members are free to choose their own price level.⁶⁶

Bans on sales to the public imposed on wholesalers are unsuitable

for Section 21(2) treatment. Though, where such restrictions are imposed on wholesalers by local authorities in the form of conditions in planning permissions in respect of the use of warehouses this will not represent a bar to Section 21(2) treatment. Many local authorities impose such conditions under the Town and Country Planning Act 1971 as a means of preventing warehouse areas being converted into retail centres with the traffic and "people" problems that entails.⁶⁷

Geographical restrictions on the areas in which a wholesaler member may supply goods to retailers are unsuitable for Section 21(2) treatment. In V.G. Grocery Services Ltd.⁶⁸ Section 21(2) dispensation was given but only after the purchasing group had abandoned certain restrictions on wholesalers rights to sell to retailers. In particular the agency had to delete from the rules restrictions on wholesalers: (i) not to supply goods bearing the trade mark of the group save in each Member's own territory; (ii) not to open or service a wholly owned shop under the VG banner in another wholesaler's territory unless the latter agrees; (iii) not to service a VG shop outside a Member's own territory unless the company in whose territory the shop is situated has agreed, and, (when it is a case of a retailer opening another shop in a different territory) unless the member shall have first tried to persuade the retailer to accept servicing from his local wholesaler; and (iv), not to canvass or supply VG shops outside a members territory with products other than grocery products

Clauses requiring members to purchase a minimum requirement from the agency may be suitable for Section 21(2) treatment where the minimum requirement does not significantly restrain the members freedom to purchase from other suppliers.⁶⁹ A large requirement has the effect of foreclosing rival suppliers from the purchasers. Under EEC rules the Commission have allowed 25% purchasing requirements.⁷⁰

The OFT do not consider as appropriate for Section 21(2) dispensation clauses prohibiting members from joining any other buying group, or, which impose quotas.

Joint purchasing may thus, perhaps with appropriate modifications, be suitable for Section 21(2) RTPA 1976 treatment. In general terms the OFT consider that joint purchasing confers benefits on consumers in that scale economies realised through quantity discounts may be passed on in lower prices. This, in turn, may enhance inter-brand competition. Where however the agency counts for a high percentage of total demand this justification is less convincing. In such cases the OFT may adopt a stricter approach to some of the restrictions in the agreement. Where

the agency enables the purchasers to negotiate fair terms with a preponderant supplier the cartel may be viewed as a counterweight to the dominant supplier. Though arguments, however economically justifiable, put to the OFT on these lines may be rejected on the basis that they are "public interest" arguments that the OFT may not consider. In this respect the argument is expressly referred to in Section 10(1)(d) RTPA 1976 (discussed in Chapter 5 Section C) and has been assessed, and accepted, by the RPC in National Sulphuric Acid Association Agreement.⁷¹

E, JOINT RESEARCH AND DEVELOPMENT

Research and development (R & D) is an integral component of competition which increasingly relies upon innovation and the creation of new or improved products or services. The introduction of new products or services stimulates competition and benefits the consumer. R & D whether concerned with innovation or imitation is thus central in maintaining a dynamic market structure; a dominant firm can almost overnight lose its market share because of the introduction of newer, superior or cheaper technology. Nonetheless the risks inherent in R & D are substantial, it is expensive and there is no guarantee of success. Co-operation in R & D reduces the risks and enables innovation to arise where otherwise it would have not have due to the unwillingness or inability of firms to bear individually the risks. Competition authorities thus adopt a favourable attitude towards joint R & D concentrating their efforts on ensuring that parties limit competition between them only so far as is necessary to attain the objectives of the R & D venture.

I. EEC Law

The Commission have always viewed joint R & D favourably. In Article 4(2)(3)(b) of Regulation 17/62/EEC the Commission provided that certain types of joint venture were exempt from the obligation to notify their agreements. Agreements having as their sole object joint research and development are accordingly exempt. This exemption is however narrow, exemption from the need to notify only lies where the joint venture does not entail any restrictions.⁷² In addition to this exemption the Commission have publically stated that many joint R & D activities do not restrict competition.⁷³ Most recently the Commission have issued a bloc-exemption granting automatic

exemption under Article 85(3) to R & D agreements satisfying its terms.⁷⁴

(i) Commission Notice on Co-operation: Research and development

In a non-binding notice issued by the Commission in 1968 a favourable attitude is expressed towards the joint implementation, placing and sharing of R & D between parties.⁷⁵ The validity of this notice remains despite enactment by the Commission of the bloc-exemption on categories of R & D agreement.⁷⁶ The following summarises the Notice and its interpretation.

- (a) The mere exchange of experience and results serving only for information does not restrict competition.
- (b) Joint R & D up to the point of industrial application is not distortive of competition. This also applies to the sharing out of fields of research provided the results are available to all participants. Where no provision as to access to results is arrived at the arrangement is to be treated as a specialisation agreement (see below, Section F).
- (c) Where parties to an agreement restrict their own independent R & D activities this does restrain competition.⁷⁷ The same conclusion applies where participation in the joint venture factually inhibits independent research albeit that they remain contractually free to undertake own R & D.⁷⁸ For example the parties might commit 90% of their R & D budget to the joint venture thereby leaving an insufficient amount to fund own-efforts.⁷⁹ Where firms do not perform own-R & D any contractual provision reinforcing the inability by a prohibition is a restriction under Article 85(1). It matters not that the firm would, in all probability, have refrained from individual R & D regardless.⁸⁰
- (d) Where parties to an agreement accept restrictions on the utilization of R & D results this may infringe Article 85(1). For example, X and Y undertake joint R & D but X agrees to use the results for certain purposes only which do not compete with Y's activities. Though, it is not a restraint if parties obtain results of the joint R & D only in relation to their contribution.⁸¹ It may be a restraint, however, if parties are excluded from results not commensurate with their contributions.
- (e) Where parties restrain the licensing of results to third parties there may be an infringement of Article 85(1).⁸² Though, parties may agree only to license third parties by common agreement or

by majority decision.⁸³ Participation in an R & D agreement restricts competition if it prevents parties from entering co-operation agreements, in particular concerning R & D, with third parties.⁸⁴ However, it is clearly permissible to restrain a party to an R & D venture from divulging results to a third party.⁸⁵

(f) In assessing joint R & D venture the structure of the agreement is immaterial, it is the effects that are important.⁸⁶

(ii) Framework of the bloc-exemption for Categories of Research and Development agreement: Regulation 418/85/EEC⁸⁷

The Regulation gives automatic exemption to three types of agreement: (a) joint R & D coupled to joint exploitation of the results; (b) joint exploitation of the results of prior R & D between the same parties; and (c) joint R & D without joint exploitation. The concept of joint exploitation includes joint manufacturing and joint licensing to third parties. It does not include joint selling and/or distribution. Under the regulation bloc-exemption only applies to formal R & D agreements whose results are likely to contribute substantially to technical or economic progress and which constitute an important part of the production of new products. Moreover, all parties must have access to results and each party must remain free to exploit independently the results where no joint exploitation occurs. Where the parties specialise in producing the new products each party must be entitled to distribute the products. The exemption is only available where the production of the parties combined on entering the agreement does not exceed 20% of the total output of the market. Where the parties are not competitors the exemption applies irrespective of market share.

In addition to this framework there are a number of other restrictions and obligations. Details of the Regulation are given below.

(iii) The basic exemption - the ambit of Regulation 418/84/EEC: Article 1

The Regulation applies the exemption in Article 85(3) to three types of agreement: (a) joint R & D of products or processes and joint exploitation of the results; (b) joint exploitation of the results of R & D products or processes jointly executed pursuant to a prior agreement between the same parties; and (c) joint R & D of products or processes excluding joint exploitation of results.

"Research and Development of products or processes" is defined to

mean: acquisition of technical knowledge; the carrying out of theoretical analysis; systematic study or experimentation including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results.⁸⁸

"Contract processes" means processes arising out of the R & D. "Contract products" means products or services arising out of the research and development or manufactured or provided applying the contract processes.⁸⁹

"Exploitation of the results" means: manufacture of the contract products; application of the contract processes; assignment of intellectual property rights; licensing of intellectual property rights; communication of know-how required for manufacture or application.⁹⁰ Hence the concept of exploitation is wide.

"Technical knowledge" means: technical knowledge which is either protected by an intellectual property right or in secret know-how. Thus technical knowledge does not necessarily have to be protected by intellectual property rights it may include secret know-how. No definition is given, however, of "secret" know-how. In general case law "secret knowledge" remains "secret" until such time as it becomes public knowledge.⁹¹ In fields where technology is rapidly advancing the Commission apparently take the view that "secret knowledge" may become "public" quite quickly.⁹² It is "public" when the knowledge becomes accessible to the average expert. This does not mean to say that the average expert actually knows of the technology but only that he should have access to it e.g. because it has been published.

Research and development is performed "jointly" where the work is: (a) carried out by a joint team, organisation or undertaking; (b) jointly entrusted to a third party; or (c), allocated between the parties by way of specialisation in research, development or production. Exploitation is performed "jointly" where the parties collaborate in any way in the assignment or the licensing of intellectual property rights or the communication of know-how.

(iv) Pre-Conditions for the existence of bloc-exemption: Article 2

Article 2 provides that the exemption only applies where certain positive conditions are satisfied.⁹³

(a) Formal structure for R & D: The Commission require that the R & D be performed within the framework of a programme defining the

objectives of the work and the field in which it is to be carried out. R & D agreements should hence be in formal contractual form. Many well drafted agreements contain a preamble setting out in general terms the respective abilities and areas of expertise of the participating firms, the reasons for the joint venture and the field in which the joint venture is to operate.

- (b) Access to results: All parties must have access to the results of the work.⁹⁴ The Commission state in paragraph 4 of the preamble that each of the parties should be given the chance to exploit "any of the results that interest it". This must surely be qualified with the proviso that access may be limited by reference to the respective contributions of the parties. If X ~~participates in a narrow~~ part of a wide venture there is no commercial reason why he should be entitled to access to all other results, however great his "interest" in them. Access should be commensurate with contribution. This has been recognised by the Commission in the co-operation notice (see above). Where universities or research institutes participate and are not interested in the industrial exploitation of the results it may be agreed that they are limited in the case of the results to further research.
- (c) Pure R & D agreements and use of results: Where the agreement provides for pure R & D each party must remain free to independently exploit the R & D results and any pre-existing technical knowledge.
- (d) Limitation on joint exploitation: Joint exploitation must be limited to results which are protected by intellectual property rights. Where know-how is concerned joint exploitation is exemptable only in respect of such know-how results that "substantially contributes to technical or economic progress". Use of these particular words refers to Article 85(3) which allows exemption where, inter alia, the agreement contributes to technical or economic progress. The Commission have added the word "substantially" before the requirement. They have not, however, given any guidance on how to quantify substantiality. No assistance is given in the preamble which merely repeats the word (paragraph 7). With both categories (intellectual property and know-how) joint exploitation is further only permissible where it is limited to those R & D results which are "decisive" (i.e. central or essential) for the manufacture of the contract products or the application of the contract process. Hence joint exploitation can only arise out

of an agreement which had joint R & D as its prime objective. Joint exploitation cannot arise from an agreement which had some other objective but which also contained some ancillary provisions on R & D. Thus if X and Y enter a specialisation agreement whereby X will concentrate on widget production and Y will concentrate on gidget production and the agreement contains some ancillary provisions relating to pooling of R & D results on a component common to both widgets and gidgets then X and Y may not obtain bloc-exemption for joint manufacture of the common component. Such a joint exploitation agreement would have to be notified to the Commission individually.⁹⁵

- (e) No joint distribution or sale: The exemption only applies where any joint undertaking, (e.g. a jointly owned company), or third party (e.g. a subsidiary of one of the parties) charged with manufacture of the products is required to supply them only to the parties. Thus, if X and Y undertake joint R & D but procure Z to perform the manufacture of the product deriving from the research then Z must supply the goods only to X and Y. It would seem that Z may not independently supply the products to the market. The Commission have publically stated that the bloc-exemption does not apply to joint distribution or selling.⁹⁶ If Z was permitted to supply to the market this would amount to Z acting as joint distributor for X and Y.
 - (f) Specialisation: Where different parties agree to specialise in the production of different results of the joint R & D then each party must agree to fulfil **orders for supplies** from all of the parties.
- (iv) Permissible time periods, duration of exempt agreement: Article 3

Article 3 of the Regulation lays down relevant time periods for the exemption. A distinction must be drawn for this purpose between R & D agreements between parties who are competitors and R & D agreements between parties who are not competitors. Competing manufacturers are apparently those whose ordinary products may be either improved or replaced by the contract product. This definition is likely to cause difficulties especially in respect of the word 'improved': X and Y jointly produce widgets which are components used in many different manufacturing processes. These widgets are of a new advanced design. X uses widgets for the manufacture of products that are very different from those manufactured by Y. However the widgets improve the products

of both X and Y. Under Article 3 X and Y are hence deemed to be competing manufacturers and stricter time periods apply to the exemption as a result. This is a surprising result since the usual Commission test for determining whether manufacturers compete is whether users of the products consider them to be equivalent in view of their characteristics, price and intended use.⁹⁷ With respect to the word "replaced" there is less problem. If X and Y jointly manufacture a product which could replace the products being produced by X and Y then, a fortiori, X and Y must be competitors or at least potential competitors.

- (a) Rules for non-competing manufacturers: Where parties to a R & D agreement do not compete the exemption lasts for the duration of the R & D programme. Where the results are jointly exploited the exemption continues for five years from the time the contract products are first put on the market within the Common Market. If X and Y market their contract product in the USA in 1986 but commence European marketing in 1988 then the exemption should run until 1993 (1988 plus five years). The Regulation is silent on from when time runs where X and Y commence marketing different products which all derive from the joint R & D at different times. If product A is first marketed in 1986 and product B in 1987 then does exemption last for different periods of time according to which product is being marketed? If X and Y decide to market one product of their R & D in 1986 but continue with R & D on other more complex products intending to market them after 1991 then it would be absurd to deny exemption to the more important fruits of the labour on the basis that time had run from marketing of a less significant product some five years earlier. Accordingly the preferable interpretation is that time runs from first marketing of each separate contract product.⁹⁸ Parties might consider drafting separate R & D agreements with respect to each product where this is possible as a means of safeguarding against the equivocality of this provision.
- (b) Rules for competing manufacturers: Where manufacturers compete (as per the meaning described above) exemption lasts for the same period as for non-competing manufacturers agreements. However this is only so where, at the time the agreement was entered, "the parties' combined production of the products capable of being improved or replaced by the contract products does not exceed 20% of the market for such products in the EEC or a substantial part thereof". The phrase a "substantial part thereof" may cause problems.

It requires parties to make an assessment of the relevant geographical market. X and Y might control 5% of the EEC market but 60% of the Benelux market where they primarily operate. In the context of Article 86 EEC the words "a substantial part" of the EEC have been construed in a minimalist, de minimis fashion. Thus, Luxembourg can per se represent a substantial part of the EEC although its population and size are relatively very small.⁹⁹ At the end of the formal exemption period bloc-exemption may, nonetheless, continue for as long as the production of the contract product together with the parties combined production of other competing goods does not exceed 20% of the total market for such products in the EEC or in a substantial part thereof. Products which compete with the contract product are those which are considered by users to be equivalent in view of their characteristics, price and intended use.¹⁰⁰ For example: X produces widgets and possesses 5% of the market; Y produces gidgets which compete with widgets and possesses 8% of the market. X and Y form a joint venture company - XY Ltd. - to produce "widgids" which compete with both widgets and gidgets. After five years of joint exploitation XY Ltd. controls about 6% of the widgid market. After ten years widgids account for 8% of the total market. Thus the combined market share of X plus Y plus XY Ltd. amounts to 21% and bloc-exemption lapses. Where contract products are components used by the parties for the manufacture of other products, reference is to be made to the markets for such of those latter products for which the components represent a "significant" part. The word significant part is not defined. Significance will hence vary according to circumstances. A component may be a significant part of the main product where it accounts for a high percentage of its weight, size or price. Alternatively a small, light-weight, cheap, but brilliantly novel component may be significant because it is considered to be so by users or purchasers of the main product.

- (c) Lapse of bloc-exemption: Exemption remains where the 20% market share is exceeded during any period of two consecutive financial years by not more than 10%.¹⁰¹ Where bloc-exemption does lapse a six month period of grace continues to apply which commences from the end of the financial year during which it was exceeded. This period enables the parties to adjust to the different legal circumstances and notify their agreement where necessary.

(vi) Permissible restrictions, "White Clauses": Articles 4, 5

Articles 4 and 5 provide a non-exhaustive enumeration of clauses that may be included in the agreement without loss of exemption. Paragraph 11 of the preamble to the Regulation makes it clear that these restrictions do not necessarily infringe Article 85(1) but that they might do in certain contexts in which case they may be cleared under the bloc-exemption. Restrictions and obligations which are similar in nature to those below but which have a more limited scope are also permitted.

Article 4

- (a) Non-competition clause: obligation preventing independent R & D by the parties in the field to which the programme relates or in a closely connected field during the currency of the programme. This ensures that the parties concentrate their efforts on the joint activity thereby maximising the chances of success.¹⁰²
- (b) Third-party agreements: obligation preventing parties from entering agreements with third parties on R & D in the field to which the programme relates or in a closely connected field during the currency of the programme. Same rationale as in (a) applies.
- (c) Procurement: obligation requiring the parties to procure the contract products exclusively from parties, trade associations, joint venture companies and others who are jointly charged with manufacturing the contract product. X and Y might be research institutes without production capacity, accordingly they agree with Z (third party) for the manufacture of the R & D product. X and Y may not (under Article 2(e) of the Regulation) use Z as a joint distributor or seller since the bloc-exemption does not extend to that point. Hence an obligation to procure the products exclusively from Z will be acceptable.
- (d) Market division: clause prohibiting parties from manufacturing the contract products or applying the contract process in territories reserved for other parties to the joint R & D. Such clauses require the parties to concentrate their marketing in defined locations thus rationalising sales effort and enhancing penetration of the contract product, or product or service derived from the contract process, on the market.
- (e) Limitations on manufacture: obligation requiring parties to restrict manufacture of the contract product or application of

of the contract process to one or more technical fields. However, such a clause does threaten the bloc-exemption where two or more of the parties are competitors at the time of entering the agreement. In such cases the clause restricts the parties rights of exploitation and individual exemption would have to be sought from the Commission.

- (f) Exclusive territories: obligation prohibiting, for five years from the time contract products are first put on the market within the Common Market, parties from actively putting the products on the market in territories reserved to other parties. Such a clause may be buttressed with other clauses preventing, for example, advertising outside of a parties territory, or preventing the establishment of any branch or distribution depot in another party's territory. However, these market division clauses must not be used to prevent parallel imports. For example X sells the contract product in the UK at 10 units; Y sells the contract product in France at 14 units. Wholesaler Z from France wishes to purchase the contract product in the UK and sell it in France at 13 units. The agreement may not prevent X from supplying Z.

At the end of the exempt period restrictions must be ended or the agreement must be notified to the Commission (Article 6(f)).

- (g) Exchange of information and improvement licenses: obligations on parties requiring them to communicate experience they have gained in exploitation to each other, and, obligations to grant each other non-exclusive licenses for inventions relating to improvements or new applications.

Article 5

- (a) Know-how, technical knowledge: obligation requiring parties to communicate patented or non-patented technical knowledge necessary for the performance of the R & D or the exploitation of its results.
- (b) Limitation on use of know-how: obligation not to use any know-how received from another party to the agreement for purposes unrelated to the joint R & D or exploitation.
- (c) Maintenance of intellectual property rights: obligation to obtain and maintain in force intellectual property rights for the contract products or processes.
- (d) Confidentiality: obligation to preserve the confidentiality of any know-how received or jointly developed under the R & D programme.

This obligation may be imposed even following expiration of the agreement.¹⁰³

- (e) Legal enforcement of intellectual property rights: Clauses requiring parties to do the following are acceptable: inform other parties of infringements of their intellectual property rights; take legal action against infringers; assist in any such legal action or share with the other party in the cost thereof.
- (f) Compensation: obligation to pay royalties or render services to the other parties to compensate for unequal contributions to the joint R & D or unequal exploitation of its results.
- (g) Royalty sharing: obligation to share royalties received from third parties with other parties.
- (h) Minimum quantities and standards: obligation to supply other parties with minimum quantities of contract products and to observe minimum standards of quality. Such clauses will be relevant, for example, in specialisation agreements where parties manufacture different contract products subject to supply rights held by the other parties.

(vii) Non-permissible restrictions, "black clauses": Article 6

The bloc-exemption only applies to agreements that may be presumed to satisfy the requirements of Article 85(3) EEC. The following clause types are of equivocal value in competition terms and if included in agreements entail loss of bloc-exemption. Such agreements should be individually notified to the Commission.

- (a) Restrictions on independent R & D: clauses which restrict the parties freedom to execute R & D either independently or in co-operation with third parties in a field unrelated to that covered by the joint venture are not automatically exempt. The same applies to the joint venture R & D or connected R & D after completion of the R & D.
- (b) No-challenge clauses: clauses restricting parties rights to challenge the validity of intellectual property rights which the parties hold in the EEC and which relate to the joint R & D are not automatically exemptable.¹⁰⁴ The same applies to the challenge of intellectual property rights which the parties hold jointly in the EEC and which relate to the results of the R & D.

- (c) Quotas: clauses restricting the parties as to the quantity of the contract products they may manufacture or sell or as to the number of operations employing the contract process they may perform are not automatically exemptable.¹⁰⁵ Whilst clauses controlling a party's output may help ensure a productive output sufficient to facilitate penetration of a new market, such clauses may also unduly hinder parties in their attempts to expand at other parties expense.
- (d) Prices: clauses restricting parties in their determination of prices, components of prices or discounts when selling the contract product to third parties are not automatically exemptable. It is unlikely that joint price fixing will be exemptable even on an individual basis.
- (e) Customer restrictions: clauses restricting the customers parties may serve are not automatically exemptable. However Article 6(e) would not apparently apply to a field of use restraint involving rivals that is excluded from the bloc-exemption by Article 4(1)(e) and consequently such a restriction could benefit from the opposition procedure (see below).
- (f) Exclusive territories: clauses prohibiting parties from putting the contract products on the market or pursuing an active sales policy for those products in territories of the EEC reserved for other parties after the end of the exemption period. Prior to end of the period such restrictions are acceptable (Article 4(1)(f)).
- (g) Limitations on manufacture: clauses prohibiting parties from allowing third parties to manufacture the contract products or apply the contract process in the absence of joint manufacture. For example X and Y agree that they will not license any firm in a specified Member State.¹⁰⁶
- (h) Hindrances to parallel imports: clauses which require parties to refuse to meet demand from users or dealers in their territories who intend to market the contract products in other territories in the EEC. Parties may not hinder parallel imports: X sells contract product in the UK at 10 units; Y sells the contract product in France at 14 units. Purchaser Z wishes to buy in the UK and will the contract products in France at 13 units. In the agreement between X and Y neither party shall sell to anyone intending to resell the products outside of their territories. Thus X should refuse to supply Z; this refusal to deal will help X and Y maintain the price differential between the UK and France. The clause

preventing supply will not be automatically exemptable. Indeed, it stands little chance of individual exemption under Article 85(3).¹⁰⁷ Parties may refuse to supply users or dealers where they have an objective justification e.g. the dealer or user does not meet the selective distribution criteria imposed by the supplier.

Similarly clauses which make it difficult for users or dealers to obtain the contract products from other dealers within the EEC are not exemptable. Thus, if X and Y agree not to provide guarantee or after-sales services to customers located outside of their territories this would hinder the ability of those customers to obtain supplies.

In particular clauses whereby the parties use intellectual property rights to prevent users or dealers marketing contract goods within the EEC where such products have been lawfully put on the market within the EEC by another party or with its consent, are not exemptable.

(viii) Extension of Exemption to agreements containing clauses not mentioned in the Regulation: the "opposition procedure" - Article 7

The list of "white", permissible clauses expressed in Article 4 and 5 is non-exhaustive. Where an agreement to which the Regulation applies (under Articles 1, 2 and 3) contains restriction that are not expressly permitted (under Articles 4 and 5) but which are not amongst the categories of "black" clauses then the exemption applies to the agreement if, following notification of the agreement to the Commission, the latter has not opposed exemption within a six months period. Details of the opposition procedure which applies also to specialisation and patent licensing agreements is given in Chapter 7 Section F.

(ix) Extension of Exemption to Connected undertakings: Article 9

The exemption extends to rights and obligations which parties create for undertaking connected with them. In this respect the market share of the connected undertaking and its general conduct is attributable to that of the parties themselves.

A "connected" undertaking is one in which a party to the agreement directly or indirectly: (a) owns more than 50% of the capital or business assets; (b) has power to exercise more than 50% of the voting

rights; (c) has power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking; or (d) has the right to manage the affairs. These criteria are non-cumulative.

The parent companies or other undertakings who control (as per the criteria above) parties to a joint venture are also "connected undertakings". Thus, if X and Y are parties then A and B who control X and Y respectively are connected undertakings. Parents of parents would also be caught. Thus where Z controls A, and A controls X, then Z is a connected undertaking with X.

Joint venture companies especially incorporated by parties are connected to the parties. Thus if X and Y incorporate XY Ltd. and each holds 50% of the shares then XY Ltd. is connected to both X and Y.

(x) Withdrawal of Exemption: Article 10

In individual cases the Commission may decide to withdraw the bloc-exemption. It would almost certainly require a formal decision to withdraw the exemption.¹⁰⁸ Article 10 gives 4 examples of instances where withdrawal of exemption might occur. These examples are not exhaustive.

- (a) The existence of the agreement substantially restricts the scope for third parties to carry out R & D in the relevant field due to limited research capacity elsewhere. The Commission have not defined "limited research capacity". If X and Y hire as employees or consultants all or a high percentage of the scientists expert in a relevant field then this might substantially restrict the scope for third party R & D. Likewise, if X and Y control the supply of raw materials necessary to the R & D and restrict the access of third parties to it then an obstacle to third party R & D exists. However, if X and Y are first in the field and exploit the contract product so that total market demand can be satisfied then the very existence of the X-Y agreement coupled to a satisfied fixed demand might deter competitive R & D. This would not however be related to limitations on research capacity elsewhere since other parties are not denied access to the resources needed for the R & D. Likewise if X, Y and Z three large oligopolists in the EEC combine in a joint R & D venture the chances for third party R & D are remote. The XYZ agreement may create entry barriers by virtue of its very size and of the scale economies it can realise. Again, the obstacles to third party R & D are unrelated to availability or

otherwise of research capacity elsewhere.¹⁰⁹

- (b) Because of the particular structure of supply the existence of the agreement substantially restricts the access of third parties to the market for the contract products. The Commission consider that in some cases the very existence of an R & D venture may operate as an entry barrier. This may be the case where demand is fixed and customers of the parties who use the contract product for their own manufacturing processes have adopted those processes to the particular characteristics of the contract product. Competitors who are late arrivals may find that customers are technologically tied to the product of the parties. Alternatively, demand levels might be such that there is room on the market for only one R & D agreement. In neither of these two examples is it very likely that exemption would be withdrawn, they are economic consequences that are inherently likely in many high technology markets and parties should not be punished for being efficient. In assessing entry barriers the Commission will consider the world wide picture.¹¹⁰
- (c) Without any objectively valid reason, the parties do not exploit the results of the R & D. A principal tenet of Commission policy on joint R & D ventures is that innovation is essential to economic growth and that if innovation is expedited by co-operation then that co-operation must be treated favourably. Where the fruits of joint R & D do not materialise the *raison d'être* of co-operation disappears.¹¹¹ Objectively valid reasons for inertia might include lingering doubts about safety or quality; imminent changes in relevant quality control or standards legislation; or, delays due to the time needed to exhaust supplies of old stock.
- (d) The contract products are not subject in the whole or a substantial part of the EEC to effective competition from identical products or products considered by users as equivalent in view of their characteristics, price and intended use. This situation concerns levels of inter-brand competition.¹¹² If X and Y jointly create an entirely new product which will replace all substitutes then there will be no (or diminishing) competition from other brands. In such situations the Commission might consider that they wish to scrutinise the R & D agreement on an individual basis and perhaps impose conditions (e.g. notification and reporting obligations) in a formal decision granting exemption under Article 85(3) EEC. Withdrawal of exemption does not imply that the agreement is anti-

competitive, only that it is unsuitable for bloc-exemption. The behaviour of parties whose contract products are not subject to effective inter-brand competition may be reviewed under Article 86 EEC since such parties may well be in a dominant position.

(xi) Transitional periods: Article 11

For agreements notified prior to 1 March 1985 the exemption has retroactive effect from the time at which the agreement satisfied the terms of the regulation.

Where the agreement is not exempt from notification under Article 4(2) (3)(b) of Regulation 17/62/EEC (which exempts pure R & D agreements with no restrictions) then the exemption in Regulation 418/85/EEC commences on a date not earlier than the date of notification.

In the case of "old" R & D agreements (see Chapter 6 Section F) which were in existence prior to 13 March 1962¹¹³ and which were notified before 1 February 1963¹¹⁴ the exemption applies retroactively from the time at which the agreement satisfied the terms of the Regulation. Where such an "old" agreement was notified prior to 1 January 1967 but was amended prior to 1 September 1985 so as to render it compatible with the bloc-exemption, such amendment being communicated to the Commission prior to 1 October 1985, Article 85(1) shall not apply in respect of the period prior to the amendment. Communication of amendments takes effect from the date of their receipt by the Commission. Where communication is by registered post the date on the postmark is determinative. The same applies to agreements covered by Article 4(2)(3)(b) of Regulation 17/62/EEC.

(xii) Currency of bloc-exemption: Article 13

According to Article 13 the Regulation applies until 31 December 1997.

(xiii) Relationship with other bloc-exemptions: Paragraph 14 of Preamble

Agreements benefiting from bloc-exemption may also take advantage of the provisions of the bloc-exemptions on: specialisation agreements (Section F below); exclusive dealing (Chapter 10); excluding purchasing (Chapter 10); and patent licensing (Chapter 13). However, where parties wish exemption under the R & D bloc-exemption the provisions of other bloc-exemptions are only applicable in so far as they do not conflict with the R & D bloc-exemption.

(xiv) Check list for application of the bloc-exemption

The Regulation should give automatic exemption to most agreements between small and medium sized undertakings. A summary of the conditions for application of the exemption is as follows:

- Condition 1: Agreement must be of a type described in Article 1 i.e. concerning: joint R & D coupled to joint exploitation of results; joint R & D without joint exploitation; joint exploitation of results of prior R & D between same parties; ~~or~~, joint R & D without joint exploitation. Exemption extends to connected undertakings as defined in Article 10.
- Condition 2: Agreement must satisfy the conditions in Article 2 concerning: formality of the structure of the R & D programme; access to results; use of results derived from pure R & D agreement; limitations on joint exploitation; joint distribution or sale; and, specialisation of production.
- Condition 3: Agreement must satisfy criteria as to duration of the agreement as laid down in Article 3. Criteria depends upon whether parties to the agreement are competing or non-competing.
- Condition 4: Agreement may contain restrictions of a type described in Article 4 and 5. These lists are non-exhaustive. See condition 6 below where parties seek incorporation of a restriction not mentioned in Articles 4 and 5.
- Condition 5: Agreement must not contain restrictions of a type described in Article 6.
- Condition 6: Where agreement contains restrictions that are not expressly permitted by Articles 4 and 5 (see Condition 4 above) but are not prohibited by Article 6 then it may be notified in accordance ~~with the~~ "opposition procedure" in Article 7. Exemption extends to such an agreement six months following notification provided that no "opposition" has been raised.
- Condition 7: Bloc-exemption may be withdrawn from any agreement where in a particular case the Commission determine that the criteria in Article 85(3) are not satisfied.

II. United Kingdom Law

(i) Registrability under the RTPA 1976

A number of clauses common in joint R & D ventures fall within the RTPA 1976 thereby rendering the agreement registrable (see Section B above).

Non-competition clauses whereby X and Y agree not to compete for a specified period of time with a jointly owned subsidiary - XY Ltd. - constitute restrictions under Section 6(1)(f)(goods) or Section 11(2)(e) (services) RTPA 1976. This conclusion does not change simply because X and Y might retain freedom to compete with XY Ltd. in certain defined circumstances.

The supply of goods and services by the parties to a jointly owned venture company will constitute disregarable clauses when registration is being considered under Sections 9(3) and 18(2) RTPA 1976.¹¹⁵

Clauses requiring the parties to purchase their requirement of the contract product exclusively from the joint venture company may be exempt under Schedule 3(2) RTPA 1976 but only where there are no other relevant restrictions in the agreement.¹¹⁶

Where the joint venture company researches and produces a component that the parents will use in their own production and the parents agree to specialise in their production of goods based on the component, this will be registrable under Section 6(1)(d) as a restriction on the description of goods to be produced. For example XY Ltd. (the joint venture company) produces product A which both X and Y use in their own manufacturing processes. X agrees to use product A in the manufacture of gadgets; Y agrees to use product A in the manufacture of widgets. X and Y are restricted as to the kinds of goods they produce. It would appear to be the case that if XY Ltd. simply derives research results i.e. it does not in any way exploit the results then a specialisation agreement may be drafted that is not registrable. Licenses for the transfer of intellectual property rights are outside the scope of the RTPA 1976.¹¹⁷ Thus if XY Ltd. transfer the R & D results in the form of a patent license or as a know-how license and include in the license restrictions on use then the agreement is not registrable. Thus XY Ltd. can license X to manufacture gadgets, and Y to manufacture widgets. Likewise, individual licenses by X and Y to XY Ltd. of know-how and other relevant patents will be outside the scope of the RTPA 1976.

Clauses whereby X and Y agree (perhaps in conjunction with XY Ltd. once it is incorporated) as to prices and terms and conditions will be registrable under Sections 6(1)(a)-(c) (goods) or 11(2)(a)-(c) (services). Such clauses might relate to sale by the joint venture of the contract product; individual sale by X and Y of the product produced by XY Ltd.; or, individual sale by X and Y of the product produced by them from R & D results derived by XY Ltd.

(ii) R & D agreements and Section 21(2) RTPA 1976

Many R & D agreements are suitable for Section 21(2) treatment. The OFT always ask whether the R & D would have been likely in the absence of the agreement. If X and Y are perfectly capable of undertaking own R & D and the market is such that there exists an incentive for both X and Y to undertake R & D then there is little economic justification for permitting X and Y to combine forces where to do so entails the negation of competition between them. Where the financial risks are very high such that individual R & D is prohibitively expensive then X and Y may be justified in entering an agreement. Where there is pressing need for rapid development of a new product an agreement between X and Y might be justified on the basis that without it neither X nor Y could have individually marketed the relevant product or service in time so might not have bothered. Where X and Y are not competitors and combine their complementary abilities to manufacture a new product then clearly the agreement is the only means by which X and Y can provide the product or service.¹¹⁸

As noted above the OFT question whether the R & D would have been likely in the absence of the agreement. They do not ask whether individual R & D would inevitably have occurred without the agreement, the question is rather one of likelihood. Thus in discussions with the OFT X and Y need not establish to any degree of certainty that they would not have undertaken own-R & D. It should suffice to show that own-R & D would be very difficult e.g. because of prohibitive cost, high risk, inadequacy of individual facilities etc.

Typical examples include agreements between pure scientists (working from universities or other research institutes) and companies able to exploit the results of the R & D. Clearly the scientist has no marketing capacity whereas the company has not the R & D ability. The results of the R & D could not have been exploited without an agreement.¹¹⁹

(iii) Joint R & D and Section 29 RTPA 1976: Agreements Important to the National Economy

A number of R & D agreements considered unsuitable for Section 21(2) dispensation have been exempted from registration under Section 29 RTPA 1976 as agreements important to the national economy. Two in particular directly concern R & D. Exempt agreements must satisfy the criteria listed in Section 29, these criteria are discussed in detail in Chapter 2 Section B. Essentially it must appear to the Secretary of State that the agreement: (a) is calculated to promote commercial ventures of substantial importance to the national economy; (b) is intended to promote efficiency or to create or improve productive capacity; (c) is the only means by which the objectives of the agreement may be realised; (d) contains only such restrictions as are reasonably necessary; and (e) is on balance expedient in the national interest.

In Agricultural Biotechnology¹²⁰ the Agricultural Research Council (ARC) and certain agricultural research Institutes which are grant aided by the ARC (the Institutes) entered an agreement with a joint venture Company-Agricultural Genetics Co. Ltd. (AG). Under the agreement ARC and the Institutes granted AG an exclusive option to adopt, develop and market in a territory defined as the whole world all discoveries made by the parties in the field of agricultural biotechnology and processes and products resulting therefrom. Under the agreement the parties remained free to undertake independent R & D though specific projects were commenced between the parties which involved AG. There were a number of ancillary restrictions including a provision restricting the right of ARC or the Institutes to enter into any form of agreement or joint venture with third parties which could affect the commercial viability of projects or activities carried on by AG.¹²¹ The exclusive option enjoyed by AG effectively negated the ability of the parties to market any product themselves without first giving AG the right to decide whether to adopt it. This was clearly a restriction under Section 6(1)(f) RTPA 1976 on ARC and the Institutes regarding the persons to whom they could supply their products i.e. they had to supply to AG should the latter exercise its option to take the product.

The agreement was exempted under Section 29 RTPA 1976 by the Secretary of State. It was apparently accepted that the agreement was

in the interests of the UK in that agricultural biotechnology was an area of technology of considerable future relevance and it was important for the UK to be well represented in the field. It was considered secondary that the agreement artificially gave the parties substantial market power. The level of international competition was another significant factor, the agreement enhanced export potential onto a rapidly developing market at an accelerated rate.

The parties had to notify their agreement to the European Commission. Interestingly, a variation to the agreement was made by the parties subsequent to approval having been given by the Secretary of State. This variation, which concerned restraints on the rights of ARC or the Institutes to enter into other agreements or joint ventures with third parties, was amended so that AG would not refuse consent on the ground of demonstrable risk of commercial prejudice or competitive disadvantage simply because the R & D proposed to be undertaken was the same or similar to work being executed under the agreement. One might surmise that the variation was introduced after discussion with the Commission who are unsympathetic towards attempts by parties to restrain the ability to enter into R & D agreements with third parties.

In Rolls Royce and GEC¹²² application of Section 29 was perhaps more straightforward. Rolls Royce (RR) and GEC possess specialist expertise which is technologically complementary. They incorporated a jointly owned and controlled company which was to undertake R & D, supply, installation and commissioning of generating sets or gas turbine drivers for use therein. The principal function of the product is to generate electricity with or without ancillary equipment. The joint company would become dominant within the UK. Both GEC and RR covenanted not to compete with the joint company thus negating the possibility of individual entry by either multinational into the market for such generating sets. Such individual entry was not impossible. However the parties claimed that, "GEC and RR intend that such complementary expertise should encourage orderly technical research and development to establish a more effective product range than one which either GEC or RR acting separately could support". The agreement thus expanded the considerable export potential of the product by enabling a wider range of products to be developed. The agreement gave the UK a powerful supplier as representative in a competitive world

market. Thus, whereas Section 21(2) would almost certainly have been inoperative, the agreement benefited from Section 29.

There is inadequate case experience on Section 29 to be able to draw accurate conclusions as to its operation. Nonetheless certain factors seem to be relevant. Briefly, these are: an agreement concerning a high technology product; considerable export potential; the existence of international competition in which it is considered important that UK companies should participate.

F. SPECIALISATION AGREEMENTS

Specialisation agreements occur where X and Y agree to allocate production of certain products between them. They may accompany this with mutual obligations on each party to supply the other with the products specialised in. Thus X and Y give up production in a defined field in favour of the other. Competition between X and Y thus disappears. However, X and Y, by the agreement can set up extended production runs and thereby realise scale economies and a rationalisation of effort. Ultimately X and Y can supply customers with the full range of products at cheaper prices. Specialisation may occur also where one party agrees simply to run down operations in one field, or, not to invest in new technology in one field, or, not to increase capacity in one field in the light of expanding demand. All of these agreements can lead, sooner or later, to specialisation.

I. EEC Law

(i) Under Article 85(1) EEC

Specialisation agreements only infringe Article 85(1) if the parties are competitors; where X and Y are not rivals the agreement will not foreclose competition between them.¹²³ Where X and Y are potential competitors then the agreement might infringe Article 85(1) albeit that at the time of entering the X and Y did not compete.¹²⁴ They may be potential competitors because they both employ similar technologies or have the requisite skills to enter each others markets. Where future competition is improbable, for example because the others market is too expensive to enter or the profit forecasts are very unattractive, then no breach of Article 85(1) occurs.

Agreements only infringe Article 85(1) where they have an appreciable effect upon trade between the Member States. Thus if X and

Y agree to concentrate production upon components that are common to them then there may be no effect on customers or competitors.¹²⁵

(ii) Exemption under Article 85(3)

The Commission recognise that specialisation agreements contribute towards improving production and distribution of goods since parties can concentrate on manufacturing specific products thus operating more efficiently and being able to sell the goods more cheaply. Provided that inter-brand competition from other suppliers is effective parties have an incentive to pass on scale economies to consumers and users.¹²⁶ The Commission has issued a bloc-exemption on specialisation.¹²⁷ This is discussed below.

(iii) Framework of the bloc-exemption for Categories of Specialisation agreement - Regulation 417/85/EEC: Article 1

The Regulation gives automatic exemption to agreements whereby undertakings accept reciprocal obligations: (a) not to manufacture certain products or to have them manufactured but to leave it to the other parties to have those products manufactured; or (b) to manufacture certain products or have them manufactured only jointly.¹²⁸ Thus specialisation can arise through X and Y agreeing negatively (i.e. not to produce a specific product), or positively, (i.e. to produce only certain products). Agreements caught by the Regulation need not be notified though where parties are unsure as to exemption they may notify and request a positive decision granting exemption.¹²⁹ More likely, the Commission will issue a comfort letter to the parties.

The exemption only applies where "reciprocal" obligations are accepted. Thus where X agrees with Y that X will no longer produce a particular product that Y produces this is not exempt since Y accepts no obligation. Such agreements should be notified though they should benefit from exemption. The Commission has recognised these agreements as being species of specialisation.¹³⁰

The Regulation only covers manufacture. Though, if X and Y also agree to specialise in R & D this may still benefit from exemption since R & D specialisation is exemptable under Article 1 of Regulation 418/85/EEC on bloc-exemption for R & D agreements. The R & D regulation and the specialisation regulation are not mutually exclusive, they can operate concurrently.¹³¹

Exemption should also apply where parties agree to specialise in

future, planned production. Article 1 states that exemption lasts for the duration of the agreement. X and Y could agree that they will specialise in production of any future results they derive from a current R & D agreement between them.

Presumably the exemption only applies where parties actually do specialise their functions. If X and Y agree on specialisation but retain a discretion whether in fact to do so then the *raison d'être* for exemption has gone, the rationalisation of production, resultant scale economies and passed on benefits to consumers are not guaranteed. Accordingly, an obligation on X and Y to actually undertake manufacture is within the scope of the exemption. Likewise obligations on X and Y to produce minimum quantities are exemptable since these only support the obligation to actually manufacture.

Surprisingly the Commission makes no mention of the communication of know-how as between the parties. Restrictions on know-how might hence take an agreement outside the exemption in which case the agreement should be notified. See Chapter 13 Section I for details of know-how licenses.

(iv) Permissible restrictions, "White Clauses": Article 2

Article 2 lays down permissible restrictions that may be incorporated in an agreement without loss of exemption. With respect to (a) - (c) below exemption also applies where the parties accept restrictions which are similar in type but have a more limited scope. Parties may choose those of the white clauses which suit their needs, the clauses are not mandatory.¹³²

- (a) Exclusivity: obligations on the parties not to conclude other specialisation agreements with third parties for the same or substitutable goods are permissible. If the restriction exceeds this obligation the bloc-exemption lapses e.g. restriction on entering agreements with third parties in fields other than specialisation. If the obligation has more limited scope then it remains exempt e.g. obligation not to enter specialisation agreement with third parties without the consent of the other parties.¹³³

An obligation preventing parties from entering specialisation agreements with third parties for products which are not the same as, nor substitutes for, the products covered by the main agreements, goes beyond the scope of the bloc-exemption and would take the agreement outside its protection.

- (b) Exclusive purchasing: an obligation on parties to procure relevant products exclusively from another party, a joint venture company or other undertaking responsible for manufacture of the relevant products is permissible where it is coupled to an "English clause" which provides that the exclusive purchase obligation is inapplicable where the relevant products are available from other sources on more favourable terms and the supplier under the main agreement is not prepared to offer the same terms. Thus if X and Y incorporate XY Ltd. to manufacture widgets for them leaving them to concentrate production on other products then X and Y can be bound to purchase widgets exclusively from XY Ltd. However, there must also be a clause providing that X and Y can purchase widgets from Z in the event that Z can offer better terms and XY Ltd. refuses to match those terms. If this proviso is not added to the exclusive purchase clause then the bloc-exemption does not apply. The proviso enables parties to purchase from the cheapest source thereby maintaining the drive towards reduced costs. Parties may wish to elaborate upon what is meant by "more favourable terms" or other details. Such elaborations are within the scope of the exemption. The same applies to the exclusive purchase obligation, parties may wish to impose duties on parties to notify the supplier in advance of requirements, or, to buy minimum quantities. These should fall within the scope of the exemption.
- (c) Exclusive distribution: obligations on the parties to grant other parties exclusive distribution rights of the products they specialise in are permissible. Thus where X produces widgets and Y produces gidgets, X can make Y exclusive dealer for widgets and Y can make X exclusive dealer for gidgets. The rationale behind this clause is that it enables each of the parties to supply the complete range of products covered by the specialisation agreement. The exclusive dealing provisions, however, must not result in access to the products by third parties (e.g. users, other suppliers, wholesalers, parallel importers) being rendered more difficult. Thus, the dealership provisions must accord with the provisions of Regulation 83/83/EEC on bloc-exemption for exclusive dealing. Thus, the dealer can not be given absolute territorial protection, he cannot be prevented from supplying the goods outside of his territory. The dealer may be prevented from undertaking active sales promotion

outside of his area but he must retain the freedom to supply unsolicited orders. (See Chapter 10 Section C III for details.)

The exemption does not extend to joint sales, agreements providing for joint selling should be notified to the Commission. It is clear that other joint selling apparatus e.g. profit pooling and equalisation of receipts (see Chapter 8 for details) are not covered and in any event stand minimal chance of exemption.

- (d) Quality control: obligations on parties to supply other parties with relevant products which observe minimum standards of quality are permissible. Standard obligations in respect of products not subject to the specialisation agreement are not exempt.
 - (e) Minimum stocks: obligations on parties to keep minimum stocks of products and of spare and replacement parts are permissible.
 - (f) Customer and guarantee services: obligations on the parties to provide customer and guarantee services for the products subject to specialisation. Thus, if X and Y produce widgets and gadgets respectively and they make each other exclusive dealer for their respective products then Y may bind X to providing customer and guarantee services on gadgets as well as on widgets, and vice versa.
- (v) Market Share threshold, Limits on the bloc-exemption: Article 3

Paragraph 6 of the preamble states: "The exemption must be limited to agreements which do not give rise to the possibility of eliminating competition in respect of a substantial part of the products in question. The Regulation must therefore apply only as long as the market share and turnover of the participating undertakings do not exceed a certain limit." Article 3 lays down these limits. There are two central criteria based upon (a) market share; and (b) turnover. Both apply cumulatively, they are not alternatives.

- (a) Market share: exemption only applies where the aggregated market share of the parties to the agreement does not exceed 20% of the market for the relevant products. The product market is defined as those subject to the specialisation agreement and those produced independently by the parties which are considered to be the same or substitutes (i.e. users would consider them equivalent in view of their characteristics, price and intended use).¹³⁴ The geographical market in which market share is to be assessed is the whole EEC or a substantial part thereof. The meaning of "substantial" is unclear,

see Section E I(iv) of this chapter for general discussion of "substantial" in the context of the R & D bloc-exemption.

A "tolerance" margin exists whereby exemption is not lost where during any period of two consecutive financial years the market share is exceeded by not more than 10%. Where, because the total market share threshold is breached to an extent not covered by the tolerance period, exemption lapses, then exemption continues to apply for a six month "tailing off" period which commences from the end of the financial year during which the threshold and tolerance margin were exceeded.

- (b) Turnover: The aggregate annual turnover of all the participants to the agreement must not exceed 500 million ECU. The "tolerance margin" and "tailing off" provisions noted above apply to turnover also. Where the turnover period is exceeded but the aggregate market share remains below 20% then the agreement may obtain exemption through the "opposition procedure" (below).¹³⁵ Under Article 6 for the purposes of calculating total annual turnover the turnovers achieved by the parties during the last financial year in respect of all goods and services excluding tax are to be added together. No account, however, is to be taken of dealings between the parties inter se or between the parties and a third party jointly charged with manufacture. Thus supplies of goods between X and Y are to be excluded as are supplies of goods between XY Ltd. (a joint manufacturing company) and X and Y. If XY Ltd. manufactures a component for X and Y, sales by XY Ltd. to X, for example, are not to be counted. A party to an agreement is described by the Regulation as a "participating undertaking". These are defined in Article 7 in terms that are, mutatis mutandis, the same as the R & D bloc-exemption definition of a "connected undertaking". For details see Section E I(viii) above.

- (vi) Extension of Exemption to agreements not satisfying the turnover requirement: the "opposition procedure" - Article 4

Paragraph 7 of the preamble to the Regulation states that it is "appropriate to offer undertakings which exceed the turnover limits set in the Regulation a simplified means of obtaining the legal certainty provided by the bloc -exemption." An "opposition procedure" is hence **available** for specialisation agreements involving parties whose aggregate turnover exceeds 500 million ECU and the tolerance margin.

Details of this "opposition procedure" are given in Chapter 7 Section F.

(vii) Withdrawal of Exemption: Article 8

The Commission may, in exceptional circumstances, withdraw the exemption. This can only be done by a formal decision.¹³⁶ Withdrawal will occur when the Commission finds that an agreement protected by the Regulation has effects which are incompatible with Article 85(3) EEC.¹³⁷ The Regulation lists two examples. Clearly, the list is non-exhaustive.

- (a) Agreement not yielding results: where the agreement is "... not yielding significant results in terms of rationalisation or consumers are not receiving a fair share of the resulting benefit". Thus, the Commission are concerned to ensure that the agreement does lead to greater efficiency, this means that the "rationalisation" of effort should result in the realisation of greater productive efficiency as producers focus their efforts and scale economies are realised as longer production runs may be carried out. Likewise these "rationalisation" benefits should lead to cheaper products for consumers with suppliers also being able to hold complete ranges of products thereby increasing consumer service and choice. The benefits arising must occur in a "significant" manner, thus parties must be able to point to substantial benefits if so challenged by the Commission.
- (b) Inter-brand competition weak: theoretically the level of competition between the contract goods and other brands should be high given that exemption only lies where the parties combined possess up to 20% of the market. Where for some exceptional circumstance inter brand competition is ineffective albeit existing then exemption may be withdrawn.

(viii) Currency of bloc-exemption: Article 10

The period of validity of the Regulation is 13 years: 1 March 1985 until 31 December 1997. The Commission note that this period is set to facilitate the conclusion of long term agreements which can have a bearing on the structure of the parties. However, they also note that if circumstances should change significantly the Commission may make the "necessary amendments".¹³⁸ Presumably, they could shorten the period of validity.

(ix) Relationship with other bloc-exemptions: Paragraph 14 of the preamble to the R & D bloc-exemption

Paragraph 14 of the R & D bloc-exemption (see Section E,I(xii) above) provides that it may apply contemporaneously with the bloc-exemption on, inter alia, specialisation. Thus a specialisation agreement entailing also joint R & D may obtain bloc-exemption for both different elements of the overall agreement. However, in the event of conflict between the two regulations the bloc-exemption on R & D takes precedence.

(x) Checklist for application of the bloc-exemption

The Regulation should give automatic exemption to most agreements between small and medium sized undertakings. A summary of the conditions for application of the exemption is as follows:

- Condition 1: Agreement must be of a type described in Article 1 involving reciprocal obligations on specialisation of products for manufacture.
- Condition 2: Agreement must not include any restrictions other than those described in Article 2 concerning: exclusivity; exclusive purchasing; exclusive distribution; quality control; minimum stocks; and, customer and guarantee services. If the agreement contains additional restrictions it should be notified.
- Condition 3: The agreement must not exceed either the market share or turnover limits in Article 3 (as elaborated upon by Articles 6 and 7).
- Condition 4: Where the agreement exceeds the turnover limit but otherwise satisfies the terms of the Regulation it should be notified in accordance with the "opposition procedure" in Article 4. Exemption extends to such an agreement six months following notification provided that no "opposition" has been raised.
- Condition 5: Agreements exceeding the market share limit can never benefit from bloc-exemption and should be notified, they may obtain individual exemption or otherwise be settled informally by comfort letter.
- Condition 6: Bloc-exemption may be withdrawn from any agreement where in a particular case the Commission determine that the criteria in Article 85(3) are not satisfied.

II. United Kingdom Law

Specialisation agreements where registrable are generally suitable for Section 21(2) treatment.

(i) Registrability

Agreements usually contain two principal restrictions. First, on production by the parties of specified products. Secondly, on mutual supply of the relevant products to each other.

The first restriction is registrable under Section 6(1)(d) or (e) RTPA 1976. If X and Y agree that in future X will concentrate exclusively on production of widgets, and Y will concentrate exclusively on production of gadgets then both have accepted restrictions as to the descriptions (i.e. kinds) of goods they will produce (under Section 6(1)(d)), i.e. X will not produce gadgets, and Y will not produce widgets). If X and Y agree that they will apply a particular process that they are both experienced in (perhaps because they have jointly derived the process through joint R & D) to different products then this is a restriction under Section 6(1)(e) on the description of goods to which the process is applied. If in either example above only one party accepts the restriction the agreement is not registrable for lack of mutuality.

If X and Y license know-how or patents to each other restrictions on use of the intellectual property rights are not registrable e.g. X may only use Y's patents for production of widgets and for nothing else. Restrictions in licenses of proprietary rights are not contracts for the supply of goods or services. Nor are limitations contained therein considered as legal restrictions.¹³⁹

Where in pursuance of a specialisation agreement X agrees to supply Y with widgets, and Y agrees to supply X with gadgets on an exclusive basis this would involve restrictions under Section 6(1)(f) on the persons to whom goods are to be supplied, i.e. X and Y must supply only to each other and therefore are restricted as to the supply to third parties. Where the agreement contains no other registrable restrictions at all then mutual exclusive dealing obligations may be exempt from registration under Schedule 3 para. 2 which exempts exclusive dealing from the Act. However, it is unclear whether mutual exclusive dealing is exempt i.e. where parties are both supplier and exclusive dealer.¹⁴⁰ Where only one party is bound to supply Schedule 3 applies (provided there are no other restrictions in the agreement).

Where in pursuance of an agreement X and Y agree to purchase exclusively from each other this entails restrictions under Section (6)(1)(f) on the persons from whom goods are to be acquired. In this situation X and Y are not restricted as to whom they may sell, the restriction is that should either party require the others product they must take supplies exclusively from that other party. Where no other restrictions at all are included then exclusive purchasing may be exempt under Schedule 3 para. 2 RTPA 1976 which exempts exclusive purchasing obligations from the Act provided no other restrictions are contained in the agreement. The same proviso applies with respect to mutual exclusive purchasing as applies to mutual exclusive dealing (see above).

(ii) Specialisation and Section 21(2) RTPA 1976

Specialisation agreements are generally suited to Section 21(2) treatment especially where the parties are small or medium sized. Registrable restrictions may not be "significant" where they enable the parties to rationalise their product and hence produce more cheaply thereby serving the consumer and intensifying competition on the market.

Where the parties are not competing but agree to supply on an exclusive basis products or services supplied by the other then the agreements, if registrable, should be suitable for Section 21(2) dispensation. In Legal and General Assurance - Forward Trust¹⁴¹ LGA was a provider of life assurance and FT was a provider of credit and loan facilities. The parties agreed that, in order to provide customers with a broader range of services they would supply the service provided by the other in addition to their own. Hence both LGA and FT now provided life assurance and credit and loan facilities. There was no restriction on either party commencing provision of the others service. Hence the case did not concern specialisation in its usual form. Nonetheless it does demonstrate that mutual exclusive dealing between suppliers of complementary products or services are suitable for Section 21(2) treatment. The agreement enabled the parties to provide a wider range of services to customers without having to divert effort into actually creating the product or service. In this case there were ancillary restrictions on LGA and FT under which, inter alia, LGA would not produce credit advertisements without the prior approval of FT; and, LGA and FT agreed to standardise the criteria they would use in deciding whether or not to allow applicants to open accounts.

In respect of specialisation agreements incorporating exclusive

purchase obligations a contractual device which renders purchasing restrictions of less significance for Section 21(2) purposes is the "English clause". In Croda-Manox¹⁴² Croda (C) and Manox (M) agreed to specialise in the production of different paints, in particular varieties called "iron blue" and "Lake Red". C would for a five year period produce "Lake Red"; M would for the same period produce "iron blue". Under the agreement C agreed to purchase its entire requirements of "iron blue" from M, "provided that Croda shall be released from this undertaking if Croda can demonstrate to Manox that equivalent material is available in comparable quantities on a continuing basis from a third party source at lower prices and Manox is unable to agree to supply at such lower prices or if Manox is unable for any reason to supply for a period of one month". The existence of such a clause means that efficiency need not necessarily suffer in the event of a failing in the joint venture agreement. The agreement in question also contained inter alia restrictions on C and M producing certain types of paint. Section 21(2) dispensation was given in 1983.

(iii) Specialisation and Section 29 RTPA 1976

Where a specialisation agreement is unsuitable for Section 21(2) treatment, for example, because the parties combined enjoy a substantial market share and hence restrictions on competition between them are significant, then Section 29 RTPA 1976 might apply. Details of the relevant procedures are given in Chapter 2 Section B. Agreements benefiting under Section 29 RTPA 1976 are exempt from registration. To obtain exemption parties must convince the Secretary of State and his staff in the DTI that the agreement is important to the national economy.

In Bowater Paper - Read Paper¹⁴³ Bowater (B) and Reed (R) purchased a company, Donside Paper (DP) to act as a jointly owned venture company. B and R agreed to concentrate production on different types of paper. DP was to be responsible for formulating a common marketing policy, co-ordinating the parties production of coated papers, and promoting further development of coated paper. It was also to produce paper on its own account and provide extra capacity for the grades produced by B and R. Under the agreement B and R agreed to act as del credere agents for each others type of paper, furthermore, both B and R would act as agents for paper produced by DP. Thus B and R specialised in different grades of paper and purchased grades they did not themselves produce from each other. With respect to paper produced by DP there was also joint

distribution and marketing through DP. With respect to paper produced by B and R the parties took independent marketing measures. B and R adopted independent price policies but had "regard" to recommendations made by the board of DP as to price differentials between different grades and qualities of coated papers. B and R are major producers in the UK, the agreement therefore had a substantial effect on the UK market. Given the size of the parties restrictions could hardly be said not to be "significant". However the agreement was exempted from registration under Section 29 RTPA 1976. A number of factors were relevant to this decision. Principally, the agreement enabled the parties to bring extra capacity on line more rapidly than would otherwise have been the case. Speed was considered important here since the extra capacity was needed to meet a substantial upturn in demand engendered through the increased use of colour printing by advertisers and consumers and the need for publishers to be prepared to meet competition from colour television. Moreover, rapid introduction of extra capacity was needed to counter increased imports into the UK from Scandinavia where producers were gearing up to increased output with an expansion of UK sales in mind. In a memorandum submitted in support of their Section 29 application the parties stated: "Duplication of installations by the British producers must be avoided in the future owing to the scale of investment required and the cost of below capacity operations. If the joint operation can be undertaken it is expected that an initial investment in a new, fast running machine, with a blade coater, will be made in the years 1971-1973. A second machine will probably be called for some three years later, depending on the speed of the growth in demand from publishers for light weight coated mechanical printing and publication papers. It is considered that the change-over from uncoated to coated light weight mechanical printing will offer the British paper industry a unique opportunity to recover a share of the market for printing papers which it has lost to foreign manufacturers in the uncoated grades. This opportunity is unlikely to occur again. "

Whether a specialisation agreement of this nature would be exempted today may be questioned. Current thinking on Section 29 tends to focus upon the creation of new and improved technology and the desirability of having UK firms competing effectively in such markets. The Bowater Paper - Reed Paper agreement which was given exemption in 1969 was predominantly an expansion of capacity scheme designed to counter

the threat of imports. More recent agreements have had an element of technology enhancement in addition to output expansion.¹⁴⁴

G. RATIONALISATION AGREEMENTS

I. Legal and Economic Context

Basic economic principle teaches that when an industry encounters an unanticipated decline in demand this will have a depressant effect upon prices, volumes sold and revenues of producers. Consumers will however benefit in the short term from the decline in prices. Where the downturn in demand is long term the market will move to readjust. Theoretically less efficient high cost producers will leave the market leaving the more efficient to satisfy demand. In practice the process of readjustment may be slow and ineffective, the efficient producers might depart leaving the inefficient to satisfy demand. Adjustment might be slow because equipment is durable, dedicated to a single function, and difficult to adapt to alternative functions; labour may be over specialised; redundancy law might hinder closures and add to exit costs where it entails substantial redundancy payments.

In certain cases, where it is predictable that market forces might not effect a restructuring of an industry in an efficient manner, it may well be in the public interest for the restructuring process to be brought about by concerted effort by the market participants; government agencies may also wish to become involved in the scheme. In such cases a rationalisation agreement might be concluded which seeks an orderly reduction of capacity in order to restore the balance between output and demand.

In a rationalisation agreement members of an industry agree to reduce capacity. This may be achieved by the total closure of some firms in consideration of departure compensation; alternatively, it may involve controlled reductions in capacity for all participant firms but no departures. Numerous alternatives exist within these frameworks. Compensation, where payable, may be funded by compulsory levys or it may be voluntary. Payment of compensation will be made conditional on evidence that the excess capacity (plant) has been irrevocably destroyed or dismantled. There may be additional restrictions on re-entry to the market or future expansion of capacity coupled to penalty payments levied for breach of the restrictions. Invariably an independent central agency (accountancy firm, merchant banker etc.) will act as referee and co-ordinator. A successful agreement will lead to the elimination of excess capacity in a swifter manner that could have been

achieved by the market, an increase in the capacity utilisation of residual plant and an overall increase in prices. The fact that the agreement may enhance prices does not imply exploitation but only a restoration of price levels allowing scope for adequate profit margins.

Rationalisation agreements inevitably require antitrust clearance. Thus, a phased capacity reduction is akin to a market sharing by quota; a system of closures and compensatory payments likewise represent a form of market division; alternatively firms who simply merge with each other with capacity being shed in the process may need merger clearance.

II. EEC Law¹⁴⁵

(i) General position

The Commission adopts a cautious yet generally favourable view towards agreements to reduce structural overcapacity:

"In a predominantly free market economy such as the Community's, it is up to each undertaking to assess for itself and at which point such overcapacity becomes economically unsustainable and to take the necessary measures to reduce it. However, within a given crisis-struck industry, economic circumstances do not necessarily guarantee a reduction of the least profitable surplus capacity. Undertakings which have failed to make the necessary adjustments may have their losses offset within their groups, to the detriment of healthy undertakings and there may be additional distortion from external subsidies."¹⁴⁶

In view of the inefficiency of individual action in certain circumstances the Commission are prepared to accept agreements aimed at co-ordinated reduction of overcapacity and which, otherwise, do not restrain free decision making by the firms involved. Restructuring, however, may not occur by price-fixing or quota schemes. Furthermore, the Commission have expressed criticism of state aids granted to firms to sustain overcapacity. Such aids are reviewable under Articles 92 and 93. Firms receiving such aid are in danger of being made the victim of Commission decisions addressed to the granting Member State to recover the aid.¹⁴⁷ (See below under UK law for details).

(ii) Meaning of structural overcapacity

The Commission have defined structural overcapacity as existing, "where over a prolonged period all the undertakings concerned have been experiencing a significant reduction in their rates of capacity utilization, a drop in output accompanied by substantial operating losses

and where the information available does not indicate that any lasting improvement can be expected in this situation in the medium-term".¹⁴⁸ It appears to be the case that structural overcapacity so defined is an essential pre-condition for a favourable approach from the Commission; curative agreements are crisis agreements justified only by exceptional circumstances. Thus, in Synthetic Fibres Agreement,¹⁴⁹ European manufacturers were experiencing a significant disparity in supply and demand which derived from adverse market conditions characterised by weak demand and increased import penetration, and, the existence of surplus capacity in the industry. To compound the structural problems firms in some sectors had sought to compete with cheap imports by creating much larger plants which enabled the realisation of scale economies leading to lower prices. These market conditions were considered acute enough to justify curative action.

(iii) Types of rationalisation agreement

Depending upon the nature of the market crisis in question rationalisation agreements may take a number of forms:

- (a) Sector agreements: agreements between whole sectors of industry to close down excess plant may be condoned. The agreement must contain detailed and binding programmes for each production centre which ensures that overcapacity is irreversibly dismantled and no new capacity is created for the duration of the agreement except for replacement capacities provided for in the restructuring agreement.¹⁵⁰
- (b) Specialisation between small groups of firms: where individual firms desire to take concerted action to reduce overcapacity they may achieve this end by a specialisation agreement whereby each party dismantles production of certain lines whilst concentrating on others.¹⁵¹
- (c) Joint capacity utilization agreements: where X and Y have excess capacity they may decide to place their plant at the disposal of the other in order that excess capacity be taken up. The need for either party to individually create new capacity diminishes if they can realise additional output from the other party's plant.¹⁵²
- (d) Mergers: X and Y merge their subsidiaries, or take over a third company, with a view to rationalising production between the parties. For details see V below on UK rationalisation mergers.

(iv) Sectoral rationalisation schemes

In Synthetic Fibres Agreement, a sectoral scheme was exempted under Article 85(3) EEC. Under the scheme parties undertook to:

- supply to a central body all relevant data concerning the capacity to be dismantled.
- accept the right of the central body to make on the spot investigations by independent experts.
- consult each other in the light of changing market circumstances with a view to identifying appropriate solutions.
- refrain from selling dismantled plant in Western Europe.
- refrain from increasing capacity, during the currency of the agreement, of capacity they have determined.
- pay compensation to other parties in the event of violation of the agreement.
- permit access to the agreement to any EEC or Western European company not already a signatory on terms to be independently negotiated.

The Commission disallowed certain clauses which had to be deleted from the scheme:

- Clause imposing a ban on investment leading to increases of capacity without the consent of all the other parties. The Commission considered that this was too inflexible. The relevant clause was deleted.
Increases in parties capacities was brought under the clause providing for consultations in the event of major changes (e.g. concerning the behaviour of European non-signatories, imports from non-European sources, or the collapse of export markets).
- Clause providing that the Commission would use its good offices in the event of difficulties arising from implementation of the agreement.
The Commission will not act as referee for the parties.
- Clause providing for the transmission of information concerning deliveries to the central body. Such clauses enable parties to monitor output and deliveries and could lead to market sharing. Rationalisation agreements permit of ordered plant closures, they do not permit of co-ordination of sales policies.
- Clause providing that the operation of plant at over 95% of the party's declared capacity would be taken as casting doubt upon the correctness of the original capacity declaration. The clause was criticised for allowing parties to monitor output and deliveries.

(v) Rationalisation schemes between individual firms

The Commission accept that individual firms may wish to restructure and that such agreements may be suitable for exemption. Thus in BPCL - ICI¹⁵³ BPCL and ICI sought by a sale of assets and specialisation agreement to rationalise their production and thereby dismantle excess capacity. Under the agreement ICI sold both its most modern UK low density polyethylene (LDPE) plants to BPCL along with all relevant goodwill and licenses for requisite LDPE technology; BPCL sold both its most modern UK polyvinylchloride (PVC) plants to ICI along with all relevant goodwill and licenses for requisite PVC technology. ICI retained two LDPE plants on the continent which formed no part of the agreement. In consequence of the agreement, though not pursuant to any provision therein, the parties closed down remaining plants in the fields they were not specialising in. Furthermore, under the agreement ICI increased its shareholding in an ethylene cracker which hitherto it had owned in equal part with BPCL. This extra capacity allowed ICI to close down its remaining ethylene plant. The result of the agreement was a specialisation of production in the UK with limitations on output through plant closures. The Commission granted Article 85(3) exemption. Another variant on rationalisation occurred in Shell - AZKO (Rovin)¹⁵⁴. Shell (S) and AKZO (A) manufactured PVC and vinylchloride monomer (VCM). S and A created a joint venture partnership, Rovin, and placed at its exclusive disposal VCM and PVC capacity owned by S and A respectively. Rovin was responsible for co-ordination of production, R & D and world wide marketing and sales. The purpose of the agreement was to achieve a structural improvement of capacity utilisation and a healthier structural situation in the sector concerned which was characterised by overcapacity. By co-ordinating their production S and A could prevent overcapacity. S and A argued that independently they could not produce VCM and PVC since they neither manufacture the required prime materials nor possess production capacity or know-how. Further the agreement enabled them to integrate the vertical production process and marketing of the products facilitating a better match between supply and demand of prime materials, a better utilisation rate of installations and the maintaining of constant quality specifications.¹⁵⁵ The Commission approved the agreement by comfort letter.

(vi) Criteria for exemption under Article 85(3) EEC

Rationalisation schemes must satisfy Article 85(3) EEC. Hence it must be established that the agreement:

- contributes to improving production or distribution or promotes technical or economic progress;
- allows consumers a fair share of the resulting benefit;
- does not impose restrictions which are not indispensable;
- does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the products in question;
- has beneficial aspects which outweigh the restrictive aspects.

- (a) Improving production or distribution etc.: production may improve where capacity reductions lead, in the long-term, to increased profitability and restored competition. In the BPCL - ICI case the agreement allowed the parties to increase loading capacity in the product in which they specialised allowing them to reduce unit costs and realise more efficient production. Furthermore, the closures stemmed loss-making activities and hence released resources for investments which help promote technical progress. The agreement achieved what market forces could not have (or would have been too slow at achieving) and hence accelerated the tendency to re-establish a supply/demand equilibrium. Similar factors applied in the Synthetic fibres Agreement case. An important additional factor in that case concerned the effect on employment prospects of capacity reductions in recession hit industries.¹⁵⁶ The Commission have been under considerable pressure to make employment an issue.¹⁵⁷ Rationalisation agreements may hence be exempted where, inter alia, the co-ordination of closures helps to mitigate, spread and stagger their impact on employment.
- (b) Consumers obtain fair share of benefit: consumers benefit if, at the end of the agreement, they can rely upon competitive and economically healthy supply structures in the EEC without having been deprived during the currency of the agreement of their freedom of choice or the benefits of competition. Consumers benefit where the agreement allows firms to be more cost **effective** and hence more competitively priced and where it allows firms to release resources from loss making activities and reinvest in new technology.¹⁵⁸

- (c) Restrictions indispensable: all restrictions must be absolutely necessary to the planned restructuring exercise. The agreement must be strictly limited to reducing surplus capacity, it must not extend to quotas or price-fixing or to the exchange and dissemination of information on deliveries and output.¹⁵⁹ Though exchange and dissemination of information which is designed solely to ensure that agreed closures are being undertaken is admissible. Likewise where it is essential that each party adhere rigidly to a closure timetable pecuniary sanctions may be imposed for violation of the agreement. Provisions allowing for the adjustment of parties obligations in the event of transfers of capacity between themselves are acceptable, the same applies to adjustments caused by the accession of new signatories to the agreement. The duration of the agreement must be the minimum necessary for the technical implementation of the programme of cutbacks. In practice the period for which exemption has been granted has varied greatly: fifteen years in BPCL - ICI; three years in Synthetic Fibres Agreement; undetermined period but at least five years in Shell - AKZO (Rovin).
- (d) Elimination of competition etc.: generally these agreements do not eliminate competition to an unacceptable degree. First, competition between the parties remains since the agreement effects plant capacity alone and not marketing; secondly, the agreement is usually made necessary by the existence of strong import competition and other firms not party to the agreement; and thirdly, the agreement is for a limited duration and hence signatories will bear in mind the return to unfettered competition in the future. Though where the agreement is between a small number of firms and external competition is strong the Commission seem willing to countenance longer periods of duration.¹⁶⁰
- (e) Benefits outweigh disadvantages: the Commission seem to accept as a rule that an agreement to overcome industry wide structural overcapacity which entails also the possibility of improved plant loading at the end of the agreement has beneficial aspects which outweigh harmful aspects.¹⁶¹

III. United Kingdom Law: Self-Help levy Schemes

The position under UK law is of considerable complexity.

Section 406 Income and Corporation Taxes Act 1970 (ICTA 1970 hereafter) provides a rather obscure but nonetheless important form of competition law exemption for rationalisation schemes. The details are given below as are details in respect of the state aid implications of Government assistance to rationalisation schemes under the Industry Act 1972.

(i) Text of Section 406 ICTA 1970

"406. (1) Notwithstanding anything contained in section 180 of this Act (general rules as to deductions not allowable), but subject to the following provisions of this Chapter, where a person pays, wholly and exclusively for the purposes of a trade in respect of which he is chargeable under Case I of Schedule D, a contribution in furtherance of a scheme which is for the time being certified by the Board of Trade under this section, the contribution shall, in so far as it is paid in furtherance of the primary object of the scheme, be allowed to be deducted as an expense in computing the profits or gains of the said trade.

(2) The Board of Trade shall certify a scheme under this section if they are satisfied -

- (a) that the primary object of the scheme is the elimination of redundant works or machinery or plant from use in an industry in the United Kingdom; and
- (b) that the scheme is in the national interest and in the interest of the said industry as a whole; and
- (c) that such number of persons engaged in the said industry as are substantially representative of the industry are liable to pay contributions in furtherance of the primary object of the scheme by agreement between them and the body of persons carrying out the scheme.

References in this subsection to an industry in the United Kingdom shall include references to the business carried on by owners of ships or of a particular class of ships, wherever that business is carried on, and, in relation to that business, references in this subsection to works or machinery or plant shall include references to ships.

(3) The Board of Trade shall cancel any certificate granted under this section if they cease to be satisfied as to any of the matters referred to in subsection (2) of this section.

(4) The Board of Trade may at any time require the body of persons carrying out a scheme certified under this section to produce any books or documents of whatever nature relating to the scheme and, if the requirement is not complied with, the Board of Trade may cancel the certificate.

(5) In this section and section 407 below, "contribution", in relation to a scheme, does not include a sum paid by a person by way of loan or subscription of share capital, or in consideration of the transfer of assets to him, or by way of a penalty for contravening or failing to comply with the scheme."

(ii) Advantages of Section 406 ICTA 1970

There are two principal advantages of Section 406. First, schemes certified under the Act are exempted from the RTPA 1976 by virtue of Schedule 3(1)(2) RTPA 1976. Hence a rationalisation scheme need not be concerned with the RTPA though such a scheme would still have to be notified to the Commission. Secondly, certified schemes obtain tax advantages. Payments made under a scheme will be treated as allowable deductions for tax purposes. Though, for companies electing to close compensation received will be treated for tax purposes as an ordinary trading receipt and will thus be taxable at the rates applicable to each company.¹⁶² An additional advantage is that the Government may give aid to the scheme under Section 8 Industry Act 1972 (see below).

(iii) Analysis of Certification Criteria in Section 406 ICTA 1970

Section 406(2)(a) -(c) lays down criteria that must be satisfied if certification is to be given.

- (a) "that the primary object of the scheme is the elimination of redundant works or machinery or plant from use in an industry in the United Kingdom". The scheme must have as its "primary" object industry rationalisation thus ancillary objectives for the scheme are not ruled out. The word "elimination" is generally understood to be permanent, irrevocable elimination. Thus the excess plant may be destroyed, dismantled or sold to domestic buyers who will not put it to use in the relevant market. The Government are also concerned that plant sold second hand to traders on the international market may find its way back to the UK. Parties may be asked to give guarantees that elimination is permanent. The existence of overseas participation in a scheme is not a bar to certification provided that their primary object is the elimination of surplus UK capacity. The tax advantages will naturally only apply to UK companies. Where international participation occurs the necessity of obtaining EEC clearance is increased.

Restrictions in rationalisation schemes must only go so far as is strictly necessary to achieve effective restructuring. The Government apparently consider that the exemption afforded such

schemes under Schedule 3(1)(2) RTPA 1976 from the strictures of that Act only covers restrictions necessary to achieve the "primary object" of the scheme. Ancillary restrictions therefore should be avoided or, if included, registered under the RTPA 1976.

- (b) "that the scheme is in the national interest and in the interest of the said industry as a whole".

Schemes will be in the national interest where they are more effective mechanisms for securing orderly restructuring than the market itself. This provision provides few problems in practice. Though if in a particular case the Government considered that the scheme would be slow in taking effect and would encourage the efficient firms to shut down capacity and the inefficient firms to remain they may be inclined to question the value of the scheme to the national interest. In general terms, however, the Government appears willing to permit the parties to make their own strategic decisions. One important consideration is employment, the 'national interest' is generally assumed to be served if without the scheme greater long-term unemployment will result than will occur with the scheme. The principle is "short-term pain for long-term gain". The Governments overall view of the scheme will have an effect upon their decision whether to grant aid.

- (c) "that such number of persons engaged in the said industry as are substantially representative of the industry are liable to pay contributions in furtherance of the primary object of the scheme by agreement between them and the body of persons carrying out the scheme."

The meaning of "substantially representative" depends upon the facts of each case. In Wire Drawing Industry¹⁶³ the companies participating operated 23 wire-drawing sites and had a combined capacity of 850,000 tonnes per annum. This constituted over 80% of estimated UK capacity and contrasted with a market demand within the UK of about 550,000 tonnes per annum. In Steel Castings: High Alloy Sector (Static Group)¹⁶⁴ the participants accounted for approximately 95% of the UK open market production of high alloy static castings. Approximately 22% of participating tonnage was closed by the scheme. In Steel Castings: General Sector¹⁶⁵ a scheme involving the closure of 10 foundries representing approximately 25% of relevant capacity and funded by contributions from remaining foundries was certified. It has been estimated that

between 50-60% of total capacity was involved in the scheme. Part of the reasoning for this was the specific exclusion from the scheme of certain categories of producer (e.g. rollmakers who had recently been fined by the Commission for price fixing and whose inclusion in the scheme was hence considered likely to raise governmental opposition; and, vertically integrated producers e.g. British Rail, National Coal Board). However, some firms refused to sign the agreement for want of conviction whilst others thought they could reap the benefits of the scheme without bearing the burdens. The Government's "ideal" figure is 80% of total capacity though figures well below this may be acceptable.

(iv) Procedure and Government Involvement: Independent Surveys

The Government describe Section 406 schemes as "self-help levy" schemes. In essence a self-help levy scheme involves the companies in a particular sector or industry in identifying one or several of their number who are willing to close plant or works in exchange for compensation which is funded by the remainder of the industry on the basis of an annual levy. The Government require initiative for such schemes to commence with the industry itself. Assistance from Government may arise in three main ways: First, by the appointment of independent consultants if appropriate to undertake sectoral studies and to explore the potential for a scheme. Secondly, by the certification of the scheme under Section 406. Thirdly, by providing, in exceptional cases, financial assistance under Section 8 of the Industry Act 1972.

The appointment of independent experts to undertake exploratory studies is generally considered essential. First, independent analysis is considered a more appropriate basis for the Government to predicate its decisions upon. Secondly, and more importantly, it is considered as an essential catalyst to bringing about productive discussion between the prospective parties to the scheme.

During 1982-1983 the DTI commissioned five sectoral studies from independent consultants with a view to promoting rationalisation schemes: cold-rolled narrow steel strip; bright bars; wire drawings; vehicle suspension springs; and, open-die forgings. The decision as to whether to appoint a consultant is, it is understood, a Ministerial one upon the advice of the sponsoring department within the DTI. Invariably the independent consultant acts as administrator of the scheme (sometimes

called the scheme trustee).

It has been noted that initiative for schemes should derive from industry. Such initiatives may be hard to come by in industries where firms are not used to talking with each other. In Steel Castings: High Alloy Sector (Static Group) the scheme arose from discussions between a number of the largest steel founding companies in the UK. The firms contacted merchant bankers Lazard Brothers & Co. with a view to their acting as consultants and administrators of a rationalisation scheme. Subsequently discussions occurred with and between: the DTI; the Bank of England, the EEC Commission; the Steel Castings Research and Trade Association; and financiers. These discussions were engendered by the Industry and not the Government.

(v) Governmental aid under Industry Act 1972

Financial assistance may be available under the Industry Act 1972. Details are given below.

- (a) Level of aid: The Government in exceptional cases, are prepared to accord financial assistance under Section 8 Finance Act 1972. Aid is offered depending essentially upon need. In the case of the steel cases (see below) aid was offered towards self-help levy schemes at the set level of 25% of total compensation paid to firms closing all capacity and departing the industry. This assistance, however, was apparently considered to be exceptional and due to the unique problems encountered by the private sector when competing against not only the British Steel Corporation (BSC) but also other vertically integrated companies in other EEC and non-EEC states (the latter despite anti-crisis measures adopted at the Community level).¹⁶⁶ In practice the Government consider the assistance is likely to be approximately 25% of total compensation payments.

Financial assistance will not be available in every case. Indeed the Government fund for assistance is of limited extent. Under the Industry Act 1982 the amount available has been increased to £1,900m with power being given to the Secretary of State, on not more than four occasions, by order made with the consent of the Treasury, to increase or further increase the limit by a sum not exceeding £200m.¹⁶⁷ The Secretary of State may pay or undertake to pay a sum not exceeding £10m in respect of any one project. Though a greater sum may be paid where consented to by a resolution of the House of Commons.¹⁶⁸

In Wire Drawing Industry the total cost of the scheme was approximately £24m of which the Government contributed £6m. In the Steel Castings Cases the Government contributed approximately £7m.

- (b) Criteria for granting aid: The Government may grant aid in accordance with Sections 7 and 8 Industry Act 1972. Under Section 7(2) aid may be granted:
- "(a) to promote the development or modernisation of an industry;
 - (b) to promote the efficiency of an industry;
 - (c) to create, expand or sustain productive capacity in an industry or in undertakings in an industry;
 - (d) to promote the reconstruction, re-organisation or conversion of an industry or of undertakings in an industry;
 - (e) to encourage the growth of, or the proper distribution of undertakings in, an industry;
 - (f) to encourage arrangements for ensuring that any contraction of an industry proceeds in an orderly way."

Section 7(2)(d) clearly justifies aid to rationalisation schemes. Section 8(1) provides that the Secretary of State may, for the purposes described in Section 7(2) and with the consent of the Treasury, grant aid where the Secretary of State is satisfied that:

- "(a) the financial assistance is likely to benefit the economy of the United Kingdom, or of any part or area of the United Kingdom, and
- (b) it is in the national interest that the financial assistance should be provided on the scale, and in the form and manner, proposed, and
- (c) the financial assistance cannot, or cannot appropriately, be so provided otherwise than by the Secretary of State."

Where these rather vague criteria are met the Secretary of State may provide financial assistance on any terms and conditions and by any description of investment, lending, guarantee or grant.¹⁶⁹ The Government generally provide assistance by way of grant of money with a view to enabling self-help levy schemes get started. Thus assistance is calculated on the basis of the minimum necessary to secure industry wide agreement that being the trigger for activation of the full scheme. Decisions on whether to grant assistance are usually Ministerial decisions with advice from the sponsoring department (i.e. the Government department responsible for the industry in question) and from the Industrial Development Unit at the DTI.

- (c) Industrial Development Advisory Board: Under Section 9 Industry Act 1972 the Board is instituted to advise the Secretary of State on the exercise of powers under Section 7 and 8 of the Act. The Board comprises a chairman plus between six and twelve other members selected for their experience of industry, banking, accountancy and finance. Where the Board advises the Secretary of State but the latter rejects the advice the Board may request the Secretary of State to lay a statement as to the matter before Parliament and the Secretary of State must comply. The organisers of schemes are usually required to be present at Board discussions. In this respect the independent consultants appointed by the Government to survey the market and who subsequently may become employed by the parties as scheme administrator are important as providers of information. Where possible the Government prefer such consultants to be retained at this stage by departments rather than by the parties to the scheme. Thus the transfer of the consultants from Government to private employ may take place at a date subsequent to the Advisory Board deliberations.

Assistance is usually granted on strict terms and conditions designed to facilitate the objectives of the scheme. Thus, the assistance may be granted on clawback terms that it will be repayable should the scheme fail and the "closers" not depart the market. Terms providing for mandatory reporting obligations (e.g. annual reports, copies of accounts etc.) on the parties or on the administrators may also be imposed. Similarly terms prohibiting re-entry to the market may be imposed on "closers" receiving compensation as well as terms providing for the permanent closure or disposal of plant. Grant letters are invariably expressed to be subject to the approval of the European Commission to the aid (see below).

(vi) Notification of aid schemes to the European Commission

- (a) Notification: Under Article 93(3) EEC Member States must notify aid schemes to the Commission for appraisal prior to their taking effect. Failure to notify the scheme is an infringement of Article 93(3) last sentence EEC which is directly effective.¹⁷⁰ This reads: "The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision." Any individual firm, for example a foreign exporter to the UK, who suffers damage as a consequence of the aid may proceed against the

~~Government~~ for breach of a directly effective provision of the Treaty (see Chapter 7 Section D for details of such actions).¹⁷¹ Although the Commission may, and invariably does, approve such schemes under Article 92 EEC, national courts have no competence to apply Article 92 EEC which lays down exemption criteria for aid schemes. Hence Commission approval is essential

- (b) Repayment actions: There is another reason why Commission approval is essential. Aid granted to individual firms unlawfully in breach of Article 93 EEC may be subject to repayment decisions issued by the Commission to the defaulting Member State.¹⁷² The Commission has already issued repayment decisions in respect of aids to firms in crisis industries. Thus, in one case, the Commission required the repayment of aid given by the Belgian Government to a synthetic fibre producer.¹⁷³ The aid was by way of a capital injection in the form of a BF 550 m majority shareholding in an insolvent synthetic fibre producer. The Belgian Government appealed the decision to the European Court but subsequently withdrew its appeal and froze the account holding the tranche of aid. The recipient was forced to repay the aid and interest earned thereon by raising loans on the open market without any Government assistance.
- (c) Commission policy: The Commission is generally sympathetic towards genuine grants of aid to facilitate rationalisation and restructuring. However it seeks to ensure the aid does not go beyond what is strictly necessary for meeting the needs of the exercise. Furthermore, the aid must be transparent i.e. open to scrutiny. The Commission adopts a very cautious view of aid to depressed industries since assistance to these sectors can have a distortive effect on competition out of proportion to the size of the aid, e.g. aid to keep open redundant plant which would close if ordinary market forces applied. Thus grantors and recipients of such aid must ensure that it is narrowly defined to stated objectives.¹⁷⁴

(vii) Other Competition law problems

All self-help levy schemes have competition implications. Parties must ensure that agreements are notified to the European Commission either under Articles 65 and 66 of the Treaty of Paris (ECSC) for iron and steel products covered by that Treaty, or under Articles 85 or 86 of the Treaty of Rome (EEC) for all other products. Similarly parties

should be prepared to discuss their schemes in the context of the merger provisions of the FTA 1973 (see below). Certified schemes are, as noted above, exempt from the RTPA 1976.

The Government has the duty under the Treaty of Rome to notify aid schemes. Though, parties may consider ensuring that such notification is made given that serious consequences may flow for parties as a result of non-disclosure by a Government (see above).

It is usual practice in cases of self-help levy schemes for the sponsoring department to make informal, direct contact with both the OFT and the DTI General Policy Division (which deals with competition matters).

(viii) Major cases certified under Section 406 ICTA

A number of cases concerned with ferrous and other metal industries have been certified. These coupled to a generally sympathetic Commission attitude have sparked considerable interest in rationalisation schemes elsewhere in the UK economy.¹⁷⁵ Two examples of major schemes are described below.

(a) Wire Drawing Industry Scheme¹⁷⁶

The purpose of this scheme was to significantly reduce the excess capacity existing within the non-alloy steel wire drawing industry and to thereby alleviate the heavy burden of prevailing overhead costs. The parties operated 23 wire drawing sites with a combined capacity of approximately 850,000 tonnes per annum. This constituted over 80% of estimated UK capacity and compared with a market demand of only approximately 550,000 tonnes per annum. Under the scheme seven sites were to cease operations altogether and fourteen others were to rationalise capacity. In total the scheme envisaged a reduction in capacity of some 212,000 tonnes per annum (i.e. 25% of parties existing capacity). The total costs amounted to about £24m of which Government contributions were £6m (25%). The Government money derived from the Private Sector Steel Scheme was intended to assist rationalisation and restructuring schemes. Money was offered towards closure and rationalisation costs (e.g. redundancy payments) and re-equipment and re-building projects for "closers" seeking new commercial outlets to invest in.

The scheme was administered by management consultants, Touche Ross & Co. who previously had been appointed by the DTI to review the wire drawing industry and to assist the companies in their

restructuring plans. The scheme was certified under Section 406 ICTA and hence was exempt from the RTPA 1976. Moreover, approval of the European Commission was given without the latter issuing a formal decision under Article 85(3).

(b) UK Steel Castings Industry Schemes 1982-1983¹⁷⁷

Between 1982 and 1983 three schemes in the Steel Castings industry were certified under Section 406 ICTA 1970 and granted aid under Section 8 Industry Act 1972. The industry suffered from the recession of the 1970's. Participants took measures to shed labour and plant, however the measures were inadequate to secure an effective realignment of supply and demand. Furthermore, there was evidence that economically the wrong plants were closing i.e. the plants closing were not the least profitable. At the request of major companies in the industry Merchant bankers, Lazard Brothers & Co. Ltd., were requested to review the market and devise a rationalisation scheme.¹⁷⁸ Negotiations commenced in May 1981 and were concluded in February 1983. The three agreements in question all derived from these negotiations and involved three sectors of the steel castings industry.

Lazard's reviewed the market and concluded that despite a degree of product heterogeneity three broad segments could be discerned premised upon products as produced by a foundry. The segments were: roll makers accounting for about 6% of industry tonnage; high alloy producers accounting for about 12% of industry tonnage; and all other products - the general sector - accounting for over 80% of industry tonnage. Subsequently, the scheme proposals for roll makers were abandoned in the light of recent Commission proceedings against participants for price fixing which, it was felt, might prejudice the producers chances of a sympathetic Commission hearing.

Under the Lazard's scheme companies would voluntarily decide to close down (closers) whilst others would remain taking on the closers' customers (openers). The openers would pay a levy out of future income from 1983-1988 to fund the immediate closure of closers. For each firm a defined reference value was arrived at. This effectively amounted to the average annual sales turnover in steel castings during the period 1980-1982. Openers paid an annual levy based upon 2½% of the reference value; closers received

compensation of 32% of their reference value upon elimination of certain predetermined plants. Additionally a sum of 4% of reference value was determined to be paid in 1988/89. In total parties to the schemes paid £13m over 5 years. The Government paid £8m under Section 8 Industry Act 1972. Approximately 16% of the industry's capacity closed; this amounted to approximately 24,000 tonnes of capacity with a market value of approximately £32m. It has been estimated that only about 50% of total capacity was involved in the schemes. This is generally considered due to the policy of certain firms to encourage the scheme from the outside and thereby to benefit from it without having to contribute financially to it.

The schemes resulted in about 2,400 redundancies.

The schemes were notified to the Commission who raised no objections under Article 85(1) (the products were not ECSC products).

IV. United Kingdom Law: Section 29 RTPA 1976

(i) Legal Context

Details of Section 29 are given in Chapter 2 Section B. The provision exempts agreements from registration where they satisfy the criteria laid down in Section 29(2)(a) - (e). A brief survey of these conditions suggests that rationalisation agreements might be suitable candidates for exemption.¹⁷⁹ The first condition requires that the agreement be calculated to promote a scheme of substantial importance to the national economy, rationalisation is certainly important where it leads to eradication of excess capacity and a healthier industrial structure. The second condition requires that the object or main object of the agreement is the promotion of efficiency or the creation or improvement of productive capacity. Clearly rationalisation reduces capacity so prima facie the latter aspects of this condition are not satisfied.¹⁸⁰ However, rationalisation does aim to enhance long term efficiency so that the first part of the condition is satisfied. The third condition requires that the object of the agreement cannot be achieved within a reasonable time except by means of an agreement. This condition is satisfied in the case of rationalisation in that it is a central justification for the agreement that unadulterated market forces would be inadequate to cure the problems of overcapacity.¹⁸¹ The fourth condition is that the restrictions are reasonably necessary to achieve

the desired objective. This causes no problems since it involves questions of drafting rather than of economic substance. The final condition is that the agreement is on balance expedient in the national interest. Again, this condition raises no substantive point.¹⁸²

(ii) When Section 29 useful

Section 406 ICTA 1970 in view of the related tax advantages is more important than Section 29. However, the former provision only covers schemes involving parties who are "substantially representative of the industry".¹⁸³ See above for details. Where the scheme does not meet these criteria Section 29 might be relevant. Thus an asset swapping scheme such as occurred in BPCL - ICI (discussed in relation to EEC law) might not meet the substantiality requirements yet it is deserving of antitrust clearance.

It may be reiterated (see Chapter 2 Section B) that schemes may only be approved where submitted to the DTI in draft form.

(iii) Relationship with EEC law

Exemption under Section 29 only clears a scheme under the RTPA 1976. It does not excuse parties ~~from the need~~ to notify to the Commission. Nor indeed does it excuse schemes from the merger provisions of the FTA 1973 where relevant (see below).

V. United Kingdom law: Rationalisation Mergers

(i) Legal Context

Firms may undertake rationalisation by way of merger. A scheme certified under Section 406 ICTA 1970 (see above) is not exempt from the merger provisions of the Fair Trading Act 1973 (FTA 1973 hereafter). Section 64(1) FTA 1973 provides that the Act applies to mergers which either create or strengthen a statutory monopoly (25% or more of specified goods or services supplied by or to the same person in the UK) or result in the transfer of assets exceeding £30m in value.¹⁸⁴ A merger occurs where two enterprises have ceased to be distinct. "Enterprise" means "the activities, or part of the activities, of a business". Accordingly, a full merger between two companies need not occur. A subsidiary of a company or a division may be merged with another firm.

Firms whose rationalisation mergers satisfy these criteria should clear their merger with the OFT. In the past this has not been a

problem. Thus in FVF - SAC¹⁸⁵, as part of the Steel Castings Scheme, Firth Vickers Foundry Ltd. (FVF) (a subsidiary of Johnson & Firth Brown PLC) continued to trade whilst Sheepbridge Alloy Castings Ltd. (a subsidiary of Guest Keen & Nettlefolds PLC (GKN)) closed. The closure costs were met in part by GKN and FVF with a contribution from the Government under the Industry Act 1972. GKN obtained a 25% interest in the business of FVF. The OFT raised no objections.

(ii) Relationship with Section 406 ICTA 1970

There is no reason why rationalisation mergers should not be certified under Section 406 thereby obtaining tax reliefs. The merger, however, must constitute a scheme, or, at least be part of a scheme as was the FVF - SAC case above which was brought about by the parties in the context of the Lazards Steel Casting Scheme.

(iii) Government financial assistance

Finance may be available under the Industry Act 1972. Assistance was provided in the FVF - SAC case. Much will depend upon the financial strengths of the parties concerned and, of course, the extent of the Government's funding capacity.

(iv) Relationship with EEC rules

Rationalisation mergers may be assessed under Articles 85 and 86 EEC. Where they involve steel and other products governed by the Treaty of Paris Article 66 ECSC is relevant. Article 66 essentially provides that any transaction leading to an increase in concentration must be authorised by the Commission. A "transaction" includes: "mergers, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control". Approval may be given under Article 66(2) ECSC where the increase in concentration does not give the parties power:

- "- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products; or
- to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets."

In assessing these criteria the Commission consider the size of the parties and their competitors to the extent that this is justified in order to avoid or correct advantages resulting from unequal competitive conditions. The Commission may impose conditions on authorisations.

In British Steel Corporation - TI Group¹⁸⁶ the Commission approved a merger between BSC and TI whereby the parties regrouped and merged part of their seamless tubes businesses into a joint company called Seamless Tubes Ltd. The merger was intended to rationalise facilities for the manufacture of smaller diameter hot-finished seamless tubes; this would enable the parties to operate more efficiently in the face of competition on a contracting market. The Commission assessed the merger under Article 66(2) ECSC in respect of tube rounds (a Treaty of Paris product), and, Article 85 EEC, in respect of seamless tubes (a Treaty of Rome product). In particular the Commission was concerned to ensure that the merger gave neither party an artificially privileged position on the international market. The Commission concluded that the merger would not have this effect. The Commission also considered the merger under Article 86 EEC but concluded that it did not enhance a pre-existing dominant position. Similarly, in British Bright Bar Limited¹⁸⁷ the Commission authorised BSC, GKN and Brymill to incorporate a joint subsidiary - British Bright Bar Ltd. - to take over the parties assets in this sector, to rationalise them and form them into a viable business. The parents would then withdraw from the sector for bright bars. The Commission considered under Article 66(2) ECSC that the merger would not secure the parent companies an artificially privileged position as suppliers of hot-rolled steel bars or producers of bright steel bars (which was an EEC product). With regard to Article 86 EEC it was held that the merger would not strengthen a pre-existing dominant position. In Hadfields¹⁸⁸ the Commission authorised a rationalisation merger between BSC and GKN to take over Hadfields Ltd. although the merger made the parents the fourth largest Community producer. However, competition was strong from other EEC producers and from imports.

VI. Section 21(2) RTPA 1976

Rationalisation agreements are generally unsuitable for Section 21(2) treatment since restrictions contained therein can hardly be said to be insignificant. Parties contemplating such agreements should consider the Section 406 ICTA and/or Section 29 RTPA 1976 routes before deciding to register their agreements under the normal rules of the RTPA 1976. Parties may wish to consult the OFT and/or DTI and/or Inland Revenue prior to entering any binding agreement.

M. PRODUCT STANDARDISATION

Agreements between competitors to standardise product specifications restrain competition in that they eliminate consumer choice. If X, Y and Z agree to use the same raw materials in the same proportions in the manufacture of their product then customers may be denied choice between different products produced by X, Y and Z. Further, X, Y and Z will be likely to allign prices since their inputs costs will be similar thereby dampening price competition. Conversely, standardisation may be very desirable where customers have to adapt their processes to match the suppliers product. Thus it is essential, for example, that a standard screw thread be developed if screws and nuts are to be matched. Poorly matched nuts and screws hampered industry and the armed forces during the First World War. To overcome such difficulties industry wide standardisation programmes are common. Standards may be used in respect of contract terms, abbreviations and symbols, dimensions or quality specifications for materials or equipment etc. Standards generally fall into two categories, performance standards and design standards. Performance standards prescribe a level of operation to be achieved with the design and materials to be used left to the discretion of the producer. Design standards prescribe the manner in which the product is to be manufactured in terms of raw materials and dimensions. Performance standards are used commonly where a specified level of performance is required, for instance, for health and safety purposes or to secure effecient performance standards. Design standards are used commonly where standardisation is desired, for example, to facilitate interchangeability between different manufacturers products. Where standardisation serves pro-competitive or consumer safety goals it is not problematic.¹⁸⁹ However, where standardisation is a smoke screen designed to hide covert, restrictive activities clearly the opposite applies.¹⁹⁰

In the absence of detailed EEC and UK case law on the matter the view of the US Department of Justice Antitrust Division on standardisation is interesting:

"Standard-setting potentially can have procompetitive or anticompetitive effects depending on the specific factual setting involved. In many instances, the formulation of industry standards can facilitate competition by reducing barriers that could otherwise exist, thereby lowering the costs of entry into the market. For example, technical compatibility standards may permit smaller producers and suppliers to enter an industry on a non-integrated basis, without necessitating entry at all at more than one stage of the industry. Standardisation can also assist consumers

in choosing from among a variety of component suppliers, or switching from one supplier to another

Although standardisation may provide some competitive benefits, there are also competitive risks associated with any standards-setting activity. Standardisation may unreasonably raise the costs to some firms of entering, or effectively competing in, a given market. For example standardisation may artificially favor the use of certain technologies in which only a few competitors have substantial experience or proprietary rights. Standards setting also may reduce the incentives of individual firms to compete in the development of innovative technologies that depart from a common benchmark, by precluding or raising the costs of introducing new technologies Finally, standardisation has the potential to facilitate collusion with respect to price, costs, marketing or other matters, for example through the exchange of proprietary or confidential information amongst competitors."¹⁹¹

I. EEC Law

The Commission has the power to issue a bloc exemption in respect of agreements relating to "the application of standards or types". It has not to date exercised this power.

There is no reason to suppose that genuine product standardisation schemes would encounter competition problems. However schemes which lead to price alignment or loss of consumer choice may be in violation of Article 85. Examples of common issues are given below:

(i) Standardisation to achieve product interchangeability

This has been at issue in the computer markets where common standards are desired to make different brands of computer product compatible with each other. In December 1984 12 major European computer companies met with 4 major US companies (excepting IBM) to discuss implementation of Open System Interconnection (OSI).¹⁹³ Adoption of OSI standards was viewed as a means of countering IBM dominance in the field. Indeed, the Commission has viewed the failure by IBM to disclose sufficient information to enable rivals to standardise interface specifications between their computer products and IBM computer products as an abuse of a dominant position by IBM. Implicit in this Commission view is a belief that product interchangerability may be desirable and pro-competitive.¹⁹⁴

(ii) Standardisation to promote consumer welfare

An agreement between manufactures to refrain from using a particular raw material or design feature may be permissible where the standardisation is to eradicate a dangerous raw material or defective

design feature. The agreement, if it infringes Article 85(1) at all, should unequivocally satisfy Article 85(3) since it improves technical progress (i.e. renders safer) and benefits the consumer (decreased risk of physical injury or breakdown of product).

An agreement to standardise labels and descriptions of contents may allow consumers to make choices between different products in a more educated manner (see Chapter 11 Section K for details).

An agreement to standardise traffic lights or colour codes on electrical goods will be permissible where they reduce consumer/user confusion and minimise the risk of injury.¹⁹⁵

Agreements to improve consumer convenience may be permissible under Article 85(3) EEC. In Uniform Eurocheques¹⁹⁶ the Commission exempted a scheme for standardising the international use and clearing of Eurocheques. Agreements coming into force in 1981 govern the system. They provide inter alia that no commission may be charged at the time of encashment of an eurocheque by the foreign cashier or retailer. Foreign banks receive a standard rate of commission payable when the cheque is reimbursed to it by the clearing centre responsible for the accepting banks area. Moreover, issuing institutions have gradually adopted a standard format for the guarantee card and the cheque. The fixing of standard commission rates clearly breached Article 85(1). However, the Commission decided that the benefits for consumers outweighed any detriments. Bearers of eurocheques may draw them in local currency in any Member State and in some non Member States. Moreover, they can often be used directly in payment to traders who benefit from the guarantee up to a certain amount. The system rationalises and improves the efficiency of the central clearing system and it accelerates the reimbursement of cheques to accepting banks. The setting of a standard rate of commission was accepted as a necessary consequence of the scheme.¹⁹⁷

(iii) Dubious standardisation

Standardisation which serves a covert, restrictive purpose will infringe Article 85(1). If manufacturers agree to standardise their products so as to avoid using low quality raw materials, or less than the state of the art components, then the consumer loses choice and is almost certainly required to pay more because of the elimination of lower quality products from the market. Standardisation thus allows producers to force consumers/users to acquire a quality of product or

service that is excessive for their needs. Standardisation must not be used to encourage aligned prices (producers all use similar raw materials) or eliminate grades of product or service from the market.¹⁹⁸

II. United Kingdom Law

Agreements to comply with standardisation schemes may be exempt from registration under Sections 9(5) and 18(5) RTPA 1976. In respect of other agreements the OFT may provide Section 21(2) dispensation where the scheme does not, as with EEC law, allow the participants to fix or align prices or unduly reduce consumer choice.

(i) Sections 9(5) and 18(5) RTPA 1976

Section 9(5) (goods provision) reads:

"... no account shall be taken of any term by which the parties or any of them agree to comply with or apply, in respect of the production, supply or acquisition of any goods or the application to goods of any process of manufacture -

- (a) standards of dimension, design, quality or performance, or
- (b) arrangements as to the provision of information or advice to purchasers, consumers or users, being either standards or arrangements for the time being approved by the British Standards Institute or standards or arrangements prescribed or adopted by any trade association or other body and for the time being approved by order of the Secretary of State made by statutory instrument."

Section 18(5) is, mutatis mutandis, the same as Section 9(2).¹⁹⁹

A number of agreements have been exempted under these provisions by the Secretary of State e.g. concerning safety precautions for veterinary products,²⁰⁰ pesticides,²⁰¹ tobacco products, and small arms (guns).²⁰²

An example is the tobacco order.²⁰³ Under this order the Secretary of State approved standards and arrangements relating to the provision of information to consumers, purchaser and users of tobacco products. The standards were incorporated in two documents entitled, "Tobacco Product Modification and Research", and, "Tobacco Product Advertising and Promotion and Health Warnings". These were drawn up at the request of the Government between the tobacco industry and the Department of Health and Social Security. The documents provide for standardisation of the information and advice given to consumers and agreements relating thereto. Thus cigarette producers may agree to standardise the government health warnings that appear on cigarette packets.

(ii) Under Section 21(2) RTPA 1976

The OFT have accorded Section 21(2) treatment to a number of agreements. Thus, an agreement to improve environmental safety by the elimination of a chemical which causes foaming in sewage works and water-courses from production of synthetic detergents has been accepted.²⁰⁴ Similarly an agreement to standardise product quality thereby facilitating consumer choice has been accepted.²⁰⁵ Also accepted under Section 21(2) is an agreement for the standardisation of cheque cards and guarantee amounts by banks which improved consumer convenience. Under this agreement which was designed to improve consumer convenience the banks agreed to standardise the form and use of the card.²⁰⁶ A similar scheme has been exempted under Article 85(3) EEC in respect of eurocheques.²⁰⁷

Agreements to standardise products because of technical specifications needed by a dominant purchaser are suitable for Section 21(2) treatment. In Plessey - GEC (5005 Crossbar)²⁰⁸ Plessey and GEC standardised the products they were contracted to supply to the Post Office. Given the desirability of the purchaser being able to acquire uniform and interchangeable products Section 21(2) was clearly appropriate. Where the consumer is a monopolist the OFT are more likely to assume that it is able to negotiate fair standards without their intervention. Agreements to protect quality may be acceptable where the agreement does no more than discourage use of defective raw materials or inputs. Thus an agreement between the British Wool Marketing Board and producers of sheep dips and powders providing for a voluntary ban on the manufacture and supply of dips and powders which have the effect of discolouring wool has been given Section 21(2) dispensation.²⁰⁹

I. JOINT CARRIAGE VENTURES

The joint provision of carriage services is generally considered not to be anti-competitive since it enables parties to realise economies which may be passed on. Where the agreement has an ulterior motive then restrictions on competition might arise.

I. EEC Law

The Commission Notice on co-operation states that agreements which have as their sole object the joint use of production facilities and storing and transport equipment do not restrict competition because they are confined to organisation and technical arrangements for the use of the facilities. There may be restrictions on competition where the parties do not bear the cost of utilisation of the installation or equipment themselves or if agreements are concluded concerning the establishment or running of a joint enterprise.²¹⁰ Thus, if X, Y and Z all agree only to use the shipping facilities provided by a joint venture company - XYZ Ltd. - and provide that in times of demand for carriage services exceeding supply capacity they will share out carriage capacity between them and not hire alternative forms of transportation then this may restrain competition since it may hinder the parties selling ability. Similarly, if X, Y and Z share warehousing facilities but agree that X will pay for 80% of the running costs of the facility this may restrain competition where X, Y and Z all use the facility equally.

II. United Kingdom Law

The OFT has taken an equally permissive attitude towards carriage sharing ventures.²¹¹ For example they have given Section 21(2) dispensation to an agreement between major oil companies for the joint transportation of petroleum through a jointly owned pipe line.²¹¹ Similarly, they have given dispensation to joint use of warehousing facilities.²¹³ As with EEC law the OFT are concerned to ensure that a participants contribution to the running costs of a facility are commensurate with utilisation. Thus a fixed agreement to share costs equally may be inappropriate where there is not roughly equal use of the facility.

FOOTNOTES

1. See generally, Ritter and Overbury, An attempt at a Practical Approach to Joint Ventures under the EEC Rules on Competition (1977) C.M.L. Rev. 601; John Temple Lang, Joint Ventures under EEC Rules on Competition - Part I (1977) Irish Jurist 15; John Temple Lang, EEC Competition Policies: A Status Report, in Enterprise Law of the 80's (eds. Rowe, Jacobs and Joelson) (1980) at pp. 22-26; Verstrynge, Problemes relatifs aux filiales Communes (1979) Cahiers de Droit Européen 13.
2. e.g. Bayer-Gist Brocades [1976] 1 C.M.L.R. D98; De Laval - Stork [1977] 2 C.M.L.R. D69; Vacuum Interrupters [1977] 1 C.M.L.R. D67.
3. e.g. GEC - Weir [1978] 1 C.M.L.R. D42; and the American decision U.S. v. Penn - Olin Chemical Co. 378 U.S. 158 (1964). The Supreme Court held that a joint venture would infringe the antitrust laws (in casu, Section 7 Clayton Act) where: (a) it was a reasonable probability that either of the parents would enter the market by constructing plant whilst the other party remained a substantial potential competitor; and (b), that the joint venture was likely to lessen competition substantially. For detailed analysis of this case see Pitofsky, Joint Ventures under the Antitrust Laws: Some Reflections on the Significance of Penn - Olin (1969) Harvard Law Rev. 1007.
4. See Vacuum Interrupters [1977] 1 C.M.L.R. D67 but c.f. United Reprocessors [1976] 2 C.M.L.R. D1.
5. e.g. SHV - Chevron [1975] 1 C.M.L.R. D68.
6. e.g. Vacuum Interrupters [1977] 1 C.M.L.R. D67; De Laval - Stork [1977] 2 C.M.L.R. D69; WANO - ICI [1979] 1 C.M.L.R. 304.
7. See Seventh Commission Competition Report (1977) at p. 115 para. 150. See also Sixth Commission Competition Report (1976) at para. 53.
8. e.g. Carbon Gas Technologie [1984] 2 C.M.L.R. 275.
9. See e.g. Rockwell - Iveco [1983] 3 C.M.L.R. 709 noted Thirteenth Commission Competition Report (1983) at pp. 81, 82 paras. 111-113.
10. Roquette - National Starch Fourteenth Commission Competition Report (1984) pp. 73, 74 paras. 87-89. (See Chapter 11 Section G on Sale of Assets and non-competition clauses).
11. *ibid.*, at p. 74 para. 89. But c.f. PRB - Shell O.J. 1984 C189/2 where the Commission objected to termination clauses which prevented on a permanent basis re-entry to the market.
12. Hoffman La Roche v. Commission (Case 85/76) [1979] 3 C.M.L.R. 211, [1979] E.C.R. 461 at para. 91 of the judgment.
13. Michelin v. Commission (Case 322/81) [1985] 1 C.M.L.R. 282 at p. 330 para. 70.
14. Continental Can v. Commission (Case 6/72) [1973] C.M.L.R. 199 [1972] E.C.R. 215 at para. 29 of the judgment.

15. See Thirteenth Commission Competition Report (1983) at p. 50 para. 54.
16. *ibid.* at p. 51 para. 55.
17. See Fourteenth Commission Competition Report (1984) at pp. 196-201.
18. The principles are essentially the same irrespective of whether X and Y form a joint venture company XY Ltd., or, whether they simply conclude an agreement between themselves. In the latter case non-competition clauses usually take the form of obligations on one party not to supply the product manufactured by the party who is producing the joint product. See e.g. No. S.1393 Register of Restrictive Trade Practices, Legal and General Assurance Society and Forward Trust (1984) joint venture to promote life assurance and credit services.
19. Sections 6(1) and 11(1)(a) RTPA 1976.
20. e.g. No. 4747 Register of Restrictive Trade Practices, RTZ and Virginia Chemicals (1984) V.C. is a US company manufacturing sodium hydrosulfite by the formate process, RTZ manufactures the product by the zinc process; VC sought a marketing base in Europe, RTZ sought a switch in manufacturing process to the formate process but lacked technical know-how. RTZ and VC incorporated a joint subsidiary in the UK to manufacture sodium hydrosulfite by the formate method. The agreement was registrable because RTZ and the subsidiary were incorporated in the UK and hence the two party requirement in Section 6(1) was satisfied.
21. Similarly, where X and Y agree that their joint venture company will only supply certain categories of customer, or, in certain defined territories. These restrictions will render the agreement registrable under Section 6(1)(f) (goods) or Section 11(2)(e) (services).
22. "Descriptions" in Section 6(1)(d) RTPA 1976 means "kinds" - British Waste Paper Association (1963) L.R. 4 R.P. 29 at p. 50.
23. Section 35(1) RTPA 1976.
24. See, Ravenseft Properties v. Director General of Fair Trading [1977] 1 All E.R. 47, and DGFT Annual Report 1976 at p. 36. See generally Chapter 2 Sections J, K and L.
25. See, Automatic Telephone and Electric Co. Ltd. (1963) L.R. 3 R.P. 462; and, Esso Petroleum Co. Ltd. v. Harpers Garage (Stourport) [1967] 1 All E.R. 699.
26. [1984] I.C.R. 429.
27. [1984] I.C.R. 12 at p. 51D.
28. e.g. No. S.466 Register of Restrictive Trade Practices, Agreement between Cleveland Co. Ltd., Texaco Ltd., Gulf Oil (GB) Ltd., Amoco and MMM Pipelines Ltd. to establish joint carriage facilities via pipeline for petroleum (1984).

29. For an analogous case see No. 4747 Register of Restrictive Trade Practices, RTZ and Virginia Chemicals (1984) RTZ and VC are rival producers of sodium hydrosulfite, however, they use different production methods. RTZ needed to change its method (the zinc process) to that of VC (the formate process) but did not possess the requisite technology. VC needed a manufacturing and marketing base in Europe. RTZ and VC hence formed a joint production venture controlled mainly by RTZ using VC know-how. The agreement enabled the parties to market sodium hydrosulfite in Europe by the formate method. Without the agreement production might not have occurred.
30. See DGFT Annual Report (1980) p. 50; DTI and OFT Document, Guidelines on the Operation of the Restrictive Trade Practices Act 1976 (1984) at Annex C para. 1; OFT Document, Restrictive Practices (1985) p. 31.
31. Section 35(1)(a) RTPA 1976.
32. Section 35(2) RTPA 1976.
33. e.g. No. 1583 Register of Restrictive Trade Practices, Structure Testing Systems Ltd. (1984): "Each paragraph above shall be construed as a separate and independent stipulation and if any restriction on the parties therein contained shall be held to be void or unenforceable all other restrictions therein contained shall remain in full force and effect."
34. e.g. Exempt Register No. 149 Agricultural Biotechnology (1984); Exempt Register No. 147 Systems X (1982); Exempt Register No. 148 Rolls-Royce and GEC (Gas Turbine powered generating sets) (1984)
35. e.g. Cimbel [1973] C.M.L.R. D167; Central Stikstof [1979] 1 C.M.L.R. 11; Cobelaz No. 1 [1968] C.M.L.R. D45; Cobelaz No. 2 [1968] C.M.L.R. D68; Comptoir Francais de L'Azote [1968] C.M.L.R. D57; Necomout Seventh Commission Competition Report (1977) at p. 94 para. 112.
36. e.g. Floral [1980] 2 C.M.L.R. 285.
37. e.g. Cobelaz No. 1 [1968] C.M.L.R. D45; Cobelaz No. 2 [1968] C.M.L.R. D68; Supexie [1971] C.M.L.R. D1.
38. CSV O.J. 1976 L192/27; Kali and Salz [1973] C.M.L.R. D219.
39. Central Stikstof [1979] 1 C.M.L.R. 11 at pp. 36, 37: "The concentration of supplies from two manufacturers of this size and importance on a Community market constitutes an economic unit which discourages foreign manufacturers from pursuing a more active export policy, effectively preventing them altogether from doing so. This danger increases in proportion to the power and solidarity of manufacturers in the country of destination." See also Commission answer to W.Q. No. 29/72, O.J. 1972 C68/11.
40. e.g. Air Forge Twelfth Commission Competition Report (1982) at pp. 71, 72 paras. 85, 86 - it is incompatible for two large producers to incorporate a joint venture which will obtain orders for goods and share them out between the parents. This amounts to prohibited market sharing.
41. See Chapter 8 Section I on equalisation receipts schemes.

42. Cimbel [1973] C.M.L.R. D167 and especially at p. D184 para. 36.
43. Kali and Salz [1973] C.M.L.R. D219. But c.f. Article 3(b) Regulation 83/83/EEC O.J. 1983 L 173/1, bloc -exemption available for non-reciprocal exclusive dealing agreements where one of the parties has a total annual turnover of not more than 100 million ECU. See Article 3(b) of Regulation 84/83/EEC O.J. 1983 L 173/5 in respect of exclusive purchasing. For analysis of these provisions see Chapter 10.
44. SAFCO [1972] C.M.L.R. D83.
45. Wild and Leitz [1972] C.M.L.R. D36; Machine Outils [1968] C.M.L.R. D23.
46. para. II(5) O.J. 1968 C 75/3 [1968] C.M.L.R. D1.
47. British Basic Slag Ltd. (1962) L.R. 3 R.P. 178, [1962] 1 W.L.R. 986 at p.994 (RPC) affirmed [1963] 1 W.L.R. 727 at pp. 738, 744 and 745 (C.A.).
48. See No. 466 Register of Restrictive Trade Practices, Agreement between Cleveland Co. Ltd., Texaco Ltd., Gulf Oil (G.B.) Ltd., Amoco and MMM Pipelines Ltd. to establish MMM Pipelines as a joint venture company to transport petroleum by pipeline to the Midlands and Manchester areas. Under the agreement the parties incorporated MMM Pipelines to construct, own, operate and maintain a pipeline from Milford Haven to Midlands and Manchester for transporting petroleum. Esso was the major contributor to share capital (75%) and was the operator of the transportation **etwork**. The tariff for transportation was set at a rate which was not in excess of that charged for alternative modes of transport. Third parties were allowed to use the network on terms that were the same as the parties to the agreement. Section 21(2) dispensation was granted in 1984. See also Freightron U.S. Department of Justice Antitrust Division Business Review Letter (February 15 1984) Shipping Associations incorporated joint venture to solicit and consolidate freight. The venture would solicit and consolidate less-than-container, and less-than-truckload cargo and would obtain rate discounts offered by truckers and railroads on these amounts. The Department of Justice stated that they would not challenge the agreement.
49. No. 4767 and S.745 Register of Restrictive Trade Practices (1982) (agreement contained registrable goods and services elements).
50. No. 5301 Register of Restrictive Trade Practices (1983). See also for other agreements involving the same parties No. 5484 (concerning a tender for work on Bridlington Community Hospital); and No. 5485 (concerning a tender for work on Goole Community Hospital). See also No. 3632 Register of Restrictive Trade Practices, National Electrical Distributors Joint Tendering Scheme (1979).
51. Exempt Register No. 148 (June 1984).
52. Exempt Register No. 149 (June 1984).
53. Exempt Register No. 147 (October 1982).
54. See Guardian, BT buys American Phone exchanges (21 Feb. 1985).

55. SOCEMAS [1968] C.M.L.R. D28, INTERGROUP [1975] 2 C.M.L.R. D14; FRUBO [1974] 2 C.M.L.R. D89; Lab O.J. 1980 L 51/19; Commission answer to W.Q. No. 676/76 O.J. 1977 C50/17. See also Co-operative Stremsel v. Commission (Case 61/80) [1982] 1 C.M.L.R. 240 [1981] E.C.R. 851 - Court condemned a joint production co-operative whose output accounted for 90% of the total output of the product in the Netherlands and who required members, upon pain of financial penalty, to purchase their total requirements from the co-operative.
56. On the basis of National Sulphuric Acid [1980] 3 C.M.L.R. 429 where the joint purchasing association was given exemption under Article 85(3) on condition, inter alia, that it reduced its buying requirement for members to 25%.
57. SOCEMAS [1968] C.M.L.R. D28, the essential point is that parties retain freedom to purchase elsewhere if they wish.
58. INTERGROUP [1975] 2 C.M.L.R. D14; National Sulphuric Acid [1980] 3 C.M.L.R. 429. Commission required deletion of clauses restricting the uses to which sulphur purchased via the pool could be put and the customers to whom it could be resold, before they would grant exemption under Article 85(3) EEC. See also Jernbranchen [1974] 2 C.M.L.R. D73 under Article 65(2) of the ECSC Treaty and see for subsequent developments in this case Thirteenth Commission Competition Report (1983) pp. 86, 87 paras. 130, 131. See also Stahlring [1972] C.M.L.R. D107 and (renewal of exemption) [1983] 2 C.M.L.R. 307 also under Article 65(2) ECSC.
59. e.g. Cementhandelaren [1973] C.M.L.R. D16.
60. This is apparently also the current view of the US Department of Justice, see Shippers Association FAK rates Business Review letter (12 February 1985). The Department notified an association of shipping associations that they would not challenge the joint negotiation by the association of freight rates. The Department stated, in the business review letter, "collective rate negotiation of the type AISA proposes has the potential to create volume discounts that result in lower freight charges. To the extent this occurs, joint negotiation of FAK [freight all kinds] contracts could be pro-competitive. The Department would challenge collective negotiation of FAK rates, however, if such concerted activity is likely to result in the exercise of market power by shippers over freight rates (monopsony power) in any relevant market."
61. e.g. SOCEMAS [1968] C.M.L.R. D28; Department Stores [1979] 3 C.M.L.R. 637; INTERGROUP [1975] 2 C.M.L.R. D14.
62. e.g. National Sulphuric Acid [1980] 3 C.M.L.R. 429 noted in tenth Commission Competition Report (1980) pp. 76, 77 paras. 112, 113.
63. See e.g. National Sulphuric Acid Association [1963] L.R. 4 R.P. 169 [1963] 1 W.L.R. 848 at p. 852 where restrictions requiring purchasers to use the elemental sulphur purchased via the pool for their own purposes and prohibiting resale to any person outside of the pool were assumed to be registrable though it is not stated under which provision of Section 6 RTPA.
64. No. 3686 Register of Restrictive Trade Practices (1977).

65. The agency has a legitimate need for information on sales and consumer patterns since this enables the agency to make more educated and efficient buying decisions. It is doubtful whether goods agreements concerning sales and volumes are registrable. See Chapter 9 Section F. See also No. 3755 Register of Restrictive Trade Practices, Independent Marketing Services, exchange of information on the availability of stocks in different parts of the country and terms which they have respectively been able to negotiate with manufacturers. Agreements concerning exchange of information of terms and conditions of trade are registrable (see Article 3(2)(b) S.I. 1969 No. 1842, discussed in Chapter 9 Section E).
66. See e.g. No. 4355 Register of Restrictive Trade Practices, N.I.S.A. (1980).
67. See e.g. No. 3686 Register of Restrictive Trade Agreements, Keen Cost Centres (1977); No. 3828 Register of Restrictive Trade Practices, Trademarks Management Ltd. (1975); No. 3603 Register of Restrictive Trade Practices, Big 'N' Cash and Carry, (1974).
68. No. 3176 Register of Restrictive Trade Practices, (1974).
69. See e.g. No. 4904 Register of Restrictive Trade Practices, GG Furniture Ltd. (1981).
70. National Sulphuric Acid Association [1980] 3 C.M.L.R. 429.
71. (1963) L.R. 4 R.P. 169, [1963] 1 W.L.R. 848.
72. Article 4(2)(3)(b) Regulation 17/62/EEC (see Chapter 6 Section J for analysis).
73. Article II(3) Notice concerning Agreements, Decisions and concerted Practices in the field of Co-operation between enterprises, O.J. 1968 C75/3, [1968] C.M.L.R. D1.
74. Regulation 418/85/EEC, O.J. 1985 L 53/5 on the application of Article 85(3) to categories of research and development agreements.
75. *Supra*.
76. Fourteenth Commission Competition Report (1984) at p. 38 para. 29, see also para. 2 of the preamble to Regulation 418/85/EEC.
77. Notice para. II(3)(3); Bayer-Gist Brocades [1976] 1 C.M.L.R. D98; Beecham - Parke Davis [1979] 2 C.M.L.R. 157 at p. 167 para. 33; Vacuum Interrupters [1977] 1 C.M.L.R. D67.
78. Eurogypsum [1968] C.M.L.R. D1; MAN-SAVIEM [1974] C.M.L.R. D123.
79. Notice para. II(3)(3).
80. See e.g. Henkel - Colgate O.J. 1972 L 14/14; GEC - WEIR [1978] 1 C.M.L.R. D42; SOPELEM - Vickers [1978] 2 C.M.L.R. 146.

81. Notice para. II(6): "It is of the essence of joint research that the results should be exploited by the participating enterprises in proportion to their participation. If the participation of certain enterprises is confined to a specific sector of the joint research project or to the provision of only limited financial assistance, there is no restraint of competition - in so far as there has been no joint research at all - if the results of research are made available to these enterprises only in relation with the degree of their participation."
82. Henkel - Colgate O.J. 1972 L 14/14; Rank - SOPELEM [1975] 1 C.M.L.R. D.72.
83. Notice para. II(3)(7). Henkel - Colgate O.J. 1972 L 14/14. See also EMI Electronics - Jungheinrich Seventh Commission Competition Report (1977) at p. 98 paras. 119, 120.
84. e.g. Rank - SOPELEM [1975] 1 C.M.L.R. D68.
85. e.g. ACEC - Berliet [1968] C.M.L.R. D35.
86. Notice para. II(3)(8).
87. O.J. 1985 L 53/5.
88. *ibid.*, Article 1(2)(a).
89. *ibid.*, Article 1(2)(b) and (c).
90. *ibid.*, Article 1(2)(d).
91. See e.g. Kabelmetal's Agreement [1975] 2 C.M.L.R. D40 at p. D46, case concerning, *inter alia*, protection of secret know-how in a patent license.
92. c.f. Reuter - BASF [1976] 2 C.M.L.R. D44: "In view of the rapid development of technology in polyurethane chemistry, it may be questioned whether such knowledge has at the present time sufficient economic value to justify its continued protection by an obligation of secrecy."
92. See paragraphs 4 - 7 of the preamble to the Regulation where the Commission explain how the Regulation and the conditions it imposes are necessary to ensure that firms qualify properly for exemption under Article 85(3) EEC.
94. See Carbon Gas Technologie O.J. 1983 L 376 - parties altered agreement to allow fair access as a condition of being granted exemption under Article 85(3).
95. See para. 7 of the preamble: "Joint exploitation is not therefore justified where it relates to improvements which were not made within the framework of a joint research and development programme but under an agreement having some other principal objective, such as the licensing of intellectual property rights, joint manufacture or specialisation, and merely containing ancillary provisions on joint research and development."
96. Fourteenth Commission Competition Report (1984) p. 38 para. 30.

97. e.g. Article 3 Regulation 83/83/EEC, O.J. 1983 L 173/1 on bloc-exemption for exclusive dealing; and, Article 3 Regulation 84/83/EEC, O.J. 1983 L 173/5 on bloc-exemption for exclusive dealing. See also Commission explanatory memorandum O.J. 1983 C 355/7 para. 21.
98. The preamble (para. 9) appears to recognise that a period of non-competition between R & D parties is necessary in respect of each contract product: "However it should be provided that the exemption will continue to apply, irrespective of the parties' market shares, for a certain period after the commencement of joint exploitation, so as to await stabilisation of their market shares, particularly after the introduction of an entirely new product, and to guarantee a minimum period of return on the generally substantial investments involved."
99. per Advocate General Warner in BP v. Commission (Case 77/77) [1978] 3 C.M.L.R. 174, [1978] E.C.R. 1513 at p. 1521. See Chapter 6 Section H for further analysis.
100. See para. 21 of the Commission explanatory memorandum on exclusive dealing and purchasing O.J. 1983 C 355/7 which comments on the user vantage point test: "Only identical or equivalent goods are regarded as belonging to the same product market. The goods in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price and intended use of the goods together. In certain cases, however, goods can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed."
101. The same margin applies in the exclusive dealing and purchasing regulations: Article 5(2) Regulation 83/83/EEC, O.J. 198 L 73/1 on exclusive dealing, and, Article 5(2) Regulation 84/83/EEC, O.J. 1983 L 73/5 on exclusive purchasing. See also Article 3(2) Regulation 417/85/EEC O.J. 1985 L 53/1 on specialisation agreements which provide the same.
102. e.g. Carbon - Gas Technologie O.J. 1983 L 376 noted thirteenth Commission Competition Report (1983) pp. 82, 83 para. 114-118.
103. See, European Music Satellite Venture [1984] 3 C.M.L.R. 162, noted Fourteenth Commission Competition Report (1984) pp. 72, 73 para. 86 comfort letter sent to consortium in the UK of the BBC, a merchant banker, and, a concert promoter and musical agent. The parties undertook a feasibility study in respect of the proposed establishment of a new satellite broadcasting company. Under the agreement the parties undertook not to disclose details of the feasibility study for a period of 3 years after a party ceased to be a shareholder in the venture. See also ACEC-Berliet [1968] C.M.L.R. D35; MAN - SAVIEM [1974] C.M.L.R. D123.
104. A licensee's obligations not to challenge the rights licensed to him is always treated as a breach of Article 85(1), e.g. Raymond-Nagoya [1972] C.M.L.R. D45; Davidson Rubber [1972] C.M.L.R. D52; Kabelmetal [1975] 2 C.M.L.R. D40; Bayer - Gist Brocades [1976] 1 C.M.L.R. D98.
105. Though in the context of intellectual property licences obligations on the licensee requiring him to produce a specified number/quantity of the licensed product are unobjectionable e.g. Burroughs - Delplanque [1972] C.M.L.R. D67; Burroughs - Geha [1972] C.M.L.R. D72.

106. See e.g. Beecham - Parke Davis [1979] 2 C.M.L.R. 157 exemption under Article 85(3) refused.
107. But c.f. the arguments on the "free-rider" problem discussed in Chapter 10 Section D. It is possible that in the future the Commission might accept clauses protecting against parallel imports which threaten the existence of an effective distribution network.
108. The Commission recognise this fact in respect of the bloc-exemption for exclusive purchasing and dealing. See para. 24 of the explanatory memorandum on those regulations O.J. 1983 C 355/7 (30 December 1983). See Chapter 10 Section C VIII on Article 6 of Regulation 83/83/EEC, O.J. 1983 L 73/1.
109. United Reprocessors [1976] 2 C.M.L.R. D1.
110. para. 10 of the preamble to Regulation 418/85/EEC.
111. See Fourteenth Commission Competition Report (1984) at pp. 37, 38 para. 28: "Although innovative efforts should be regarded as a normal part of the entrepreneurial spirit of individual undertakings, it can not be denied that in many cases the synergy arising out of co-operation is necessary because it enables the partners to share the financial risks involved and in particular to bring together a wider range of intellectual and mental resources and experience, thus promoting the transfer of technology. In the absence of such co-operation, the innovation may not take place at all, or otherwise not as successfully or efficiently. Also, the present situation in the Community demands a more rapid and effective transformation of new ideas into marketable products and processes, which may be facilitated by joint efforts by several undertakings."
112. See Amersham - Buchler O.J. 1982 L 314 noted Twelfth Commission Competition Report (1982) pp. 70, 71 paras. 83, 84; VW - MAN O.J. 1983 L 376 noted Thirteenth Commission Competition Report (1983) at pp. 83, 84 paras. 119-121.
113. In the case of agreement subject to Article 85(1) EEC as a result of the accession of the UK, Ireland and Denmark the date is 1 January 1973, for Greece the date is 1 January 1981.
114. *ibid.*, 1 July 1973, for Greece the date is 1 July 1981.
115. See, Chapter 1 Section E for details. Sections 9(4) and 18(3) RTPA 1976 withdraw the benefit conferred by Sections 9(3) and 18(2) where the term appears in a contract for the supply of goods between suppliers (or buyers) *inter se*. However, this withdrawal of benefit does not operate where the term is in a contract for supply which is itself made in pursuance of an agreement that has been registered, or, is exempt from registration under Section 29 RTPA 1976. Thus, even where the parents are in competition with the subsidiary Sections 9(3) and 18(2) may still apply provided the agreement is registered or exempt under Section 29.
116. See, Chapter 2 Section I for details.
117. See, Chapter 2 Sections J, K and L for details.
118. e.g. No. S 745 Register of Restrictive Trade Practices, Water Injection and Treatment Agreement (1982).

119. e.g. No. S.960 Register of Restrictive Trade Practices, Sea Energy Associates Ltd. (1981). Agreement concerned the exploitation of a device invented and developed by a University scientist for extracting electrical energy from the action of ocean waves. See also No. S.1583 Register of Restrictive Trade Practices, Structure Testing Systems Ltd. (1984) concerning the exploitation of an invention relating to the structural testing of buildings for defects.
120. Exempt Register No. 149 (11 June 1984).
121. Such a clause would probably be exempt under Schedule 1 para. 13 from the Scope of the RTPA. This provision excludes from the Act the services of professional engineers or technologists operating in the field of, inter alia, "metallurgy, chemistry, biochemistry or physics or ... any other form of ... technology analogous to those mentioned ..." The services of a professional biochemist would appear to be excluded from the Act. An agreement which restrains a biochemist's ability to provide biochemistry services in an R & D venture is hence excluded from the Act.
122. Exempt Register No. 148 (19 June 1984).
123. SOPELEM - Langen [1972] C.M.L.R. D77; Jaz - Peter II [1978] 2 C.M.L.R. 1184.
124. Machine Outils [1968] C.M.L.R. D23.
125. MAN -SAVIEM [1974] C.M.L.R. D123; Clima - Chappée-Buderus [1970] C.M.L.R. D7.
126. para. 3 of preamble to Regulation 417/85/EEC O.J. 1985 L 53/1 on bloc-exemption for categories of specialisation agreement.
127. *ibid.* This Regulation replaced Regulation 2779/72/EEC, O.J. 1972 L 292/23, as amended by Regulation 2903/79/EEC O.J. 1977 L 338/14.
128. *ibid.*, Article 1 and see para. 4 of the preamble.
129. *ibid.*, para. 9 of the preamble.
130. See e.g. Prym - Beka [1973] C.M.L.R. D250 the Commission has accepted that such agreements may be specialisation agreements and hence suitable for Article 85(3) exemption.
131. Article 1(3)(a) and para. 14 of preamble to Regulation 418/85/EEC, O.J. 1985 L 53/5 on bloc-exemption for R & D agreements. See: MAN -SAVIEM [1974] C.M.L.R. D123; SOPELEM - Langen [1972] C.M.L.R. D77.
132. para. 5 of the preamble to Regulation 417/85/EEC.
133. This consent of other parties clause was specifically exempted under Article 2(a) Regulation 2779/72/EEC, the precursor to Regulation 417/85/EEC.
134. See for Commission thinking on the "consumer vantage" test para. 21 Commission explanatory Memorandum to the bloc-exemptions on Exclusive dealing and purchasing O.J. 1983 C 355/7 (30 December 1983).

135. Fourteenth Commission Competition Report (1984) pp. 44, 45 para. 42.
136. See for commentary on analogous provisions in the bloc-exemptions on exclusive dealing and purchasing, paragraph 24 of the explanatory memorandum to the exclusive dealing and purchasing regulations, O.J. 1983 C 355/7. For analysis see Chapter 10 Section C VIII on Article 6 of Regulation 83/83/EEC, O.J. 1983 L 73/1.
137. The power to withdraw an exemption derives from Article 6 of Regulation 2821/71/EEC on the application of Article 85(3) to categories of Agreement, decision and concerted practice J.O. 1971 L 285/46 (20 December 1971) - The Commission may respond on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest.
138. Paragraph 8 of the preamble to the Regulation.
139. See Chapter 2 Sections J, K and L for details.
140. See Chapter 3 Section I for details.
141. No. S.1393 Register of Restrictive Trade Practices (1984).
142. No. 5044 Register of Restrictive Trade Practices (1983).
143. Exempt Register 2 (January 1969) exemption given for 6 years, extended in 1975 for a further 4 years. The agreement was terminated by the parties in December 1977.
144. See cases on Section 29 in Section E (R & D agreements).
145. See Twelfth Commission Competition Report (1982) at pp. 43-45; Thirteenth Commission Competition Report (1983) at pp. 53-56; Fourteenth Commission Competition Report (1984) at pp. 69-72.
146. Twelfth Commission Competition Report (1982) p. 43 para. 38. This view has been confirmed in Synthetic Fibres Agreement [1985] 1 C.M.L.R. 787 at p. 796 para. 30. See also Commission answer to W.Q. No. 578/84 O.J. 1984 C 344/5 para. 3.
147. See Commission Notice on State aids, O.J. 1980 C 252/2 noted Flynn, (1983) E.L. Rev. 297, and subsequent Commission Notice at O.J. 1983 C 318/3 on recovery from recipients of aids illegally paid. See also the view of the European in Commission v. Germany (Case 70/72) [1973] E.C.R. 813 at p. 829.
148. Twelfth Commission Competition Report (1982) p. 43 para. 38.
149. [1985] 1 C.M.L.R. 787.
150. e.g. ibid. See also Zinc Shutdown Agreement [1983] 2 C.M.L.R. 473 - parties not restrained from investing in capacity that was not shutdown in order to modernise it provided capacity not substantially increased thereby. The agreement was later terminated by the parties: Commission Press Release (Jan. 9 1984) I.P. (84) 8.
- 151 e.g. BPCL - ICI O.J. 1984 L 212/1 (8 August 1984).

152. Shell - AKZO (Rovin) Notice pursuant to Article 19(3) of Regulation 17/62/EEC, O.J. 1983 C 295/7 - case settled by comfort letter. See also PRB - Shell Notice pursuant to Article 19(3) of Regulation 17/62/EEC, O.J. 1984 C 189/2. Parties rationalised production by jointly placing capacity at disposal of joint venture company.
153. O.J. 1984 L 212/1 (8 August 1984).
154. O.J. 1983 C 295/7 Notice pursuant to Article 19(3) of Regulation 17/62/EEC, case settled by comfort letter, see Bull E.C. 5/84 p. 38; Thirteenth Commission Competition Report (1983) para. 71.
155. *ibid.*, at p. 10 para. 15.
156. [1985] 1 C.M.L.R. 787 at p. 797 para. 37. See also Twelfth Commission Competition Report (1982) pp. 43, 44 para. 39.
157. See Commission answers to W.Q. No. 1723/83 O.J. C148; and W.Q. No. 2182/83 O.J. 1984 C 158/16 at p. 17 para. 2: "The Commission wishes restructuring plans to be carried out with full account being taken of the social consequences of the decisions envisaged"
158. Synthetic Fibres Agreement [1985] 1 C.M.L.R. 787 at pp. 797, 798 paras. 39-41; BPCL - ICI O.J. 1984 L 212/1 at pp. 8, 9 para. 36.
159. *ibid.*, at p. 798 para. 43.
160. e.g. Shell - AKZO (Rovin) O.J. 1983 C 295/7.
161. BPCL - ICI O.J. 1984 L 212/1 at p. 8 para. 34.
162. Section 408(1) subject to the reliefs provided for in Section 408(2), (3) and (4), and, Schedule 11 ICTA 1970.
163. 2 December 1982.
164. 23 March 1982.
165. 11 February 1983.
166. This assistance was provided under the Private Sector Steel Scheme which is an offshoot of Section 8 Industry Act 1972.
167. Section 1(1) Industry Act 1982 amending Section 8(7) Industry Act 1972 as itself amended by the Industry Act 1976.
168. *ibid.*, Section 1(2).
169. *ibid.*, Sections 8(2) and 7(3).
170. See Steinike and Weinlig (Case 78/76) [1977] 2 C.M.L.R. 688, [1977] E.C.R. 595; Heineken Brouwerijen v. Inspecteur de Vennootschapsbelasting (cases 91/83 and 127/83) [1985] 1 C.M.L.R. 389 at para. 11 of the judgment. See Flynn, *State aid and Self Help*, (1983) E.L. Rev. 297.
171. See Regina v. Attorney General ex parte Imperial Chemical Industries PLC [1985] 1 C.M.L.R. 588 at para. 67. See also Garden Cottage Ltd. v. Milk Marketing Board [1984] 1 A.C. 13, [1983] 3 C.M.L.R. 43. See Commission
... continued

171. continued ...
answer to W.Q. No. 308/84 O.J. 1984 C 243/3 at p. 4 para. 2: "The Commission would also stress that, since the procedural rules of Article 93(3) are directly applicable, it is always open to undertakings concerned to bring actions in the national courts to secure the withdrawal of an illegally granted aid."
172. See Commission v. Germany (Kohlegesetz) (Case 70/72) [1973] E.C.R. 813 at p. 829. See also the Commission notice on unlawful aid grants, O.J. 1980 C 252/2 entitled "The notification of state aids to the Commission pursuant to Article 93(3) of the EEC Treaty: the failure of the Member States to respect their obligations." See the Commission comment at Tenth Commission Competition Report (1980) at para. 162 "... any aids implemented by Member States without due notification and adoption of a decision by the Commission are paid illegally and may therefore be subject to a decision that repayment be made on the aid in question." The Commission have reaffirmed this policy in a Communication O.J. 1983 C 318/3 which gives a warning to aid recipients that they may have to refund the aid.
173. Dec. 84/111/EEC, O.J. 1984 L 62/18 (3 March 1984) noted Fourteenth Commission Competition Report (1984) at pp. 151, 152. See also for another example of a repayment order: Dec. 83/130/EEC O.J. 1983 L 91/32. The Commission, following the refusal of the Belgian Government to comply with this decision, have referred the case to the European Court under Article 93 (2) EEC: (Case 52/84) O.J. 1984 C 81/5.
173. See Commission answer to W.Q. No. 2060/82 O.J. 1983 C 167/11 concerning aid to the zinc sector. For detailed analysis of Commission policy with regard to steel products see Dec. 257/80/ECSC O.J. 1980 L 29/5 (6 February 1980) discussed Tenth Commission Competition Report (1980) at p. 134 et seq. and see also Dec. 2320/81/ECSC O.J. 1981 L 228/14 amending the earlier decision. See also Twelfth Commission Competition Report (1982) at pp. 114-123 for a very detailed account of Commission policy. For rules on "transparency" see Directive 80/723/EEC O.J. 1980 L 193/35 (29 July 1980). See also, for a major example, of Commission policy toward and by the UK Government to restricting efforts in the steel sector: Dec. 83/399/ECSC O.J. 1983 L 227/37 (29 June 1983).
175. See NEDO Report, Competition Policy (1978) at p. 13 which states that UK competition authorities should take a sympathetic line with, inter alia, "temporary cartelisation" in a "... declining industry to facilitate the controlled scrapping of outdated plant and equipment in order to concentrate production in the most efficient plants." See also at pp. 34-37.
176. 2 December 1982.
177. High Alloy Sector (Static Group) (23 March 1982); General Sector (11 February 1983); GVF - SAC (31 March 1983).
178. Apparently at the suggestion of British Steel Corporation Chairman, Ian MacGregor. SCRATA (Steel Castings Research and Trade Association) was considered practically inappropriate and the Government was considered inappropriate for obvious political reasons.
179. This was also the view of the NEDO Report Competition Policy (1978) at pp. 34, 35.

180. Though it is arguable that rationalisation does improve the productive capacity of those remaining in the industry.
181. This has been accepted by the Commission: See Synthetic Fibres Agreement [1985] 1 C.M.L.R. 787 at paras. 31, 32.
182. See for a similar Commission balancing act BPCL - ICI O.J. 1984 L 212/1 at p. 8 para. 24.
183. Section 406(2)(c) ICTA 1970.
184. See S.I. 1984 No. 932 raising the asset value test to £30.
185. 31 March 1983.
186. Thirteenth Commission Competition Report (1983) at p. 99, Bull E.C. 12/83 at para. 2.1.68. See also Fagersta - Sandvik Tube AB Thirteenth Commission Competition Report (1983) pp. 99, 100. See also Commission answer to W.Q. No. 86/82 O.J. 1982 C167/118 on the Cockerill-Sambre merger (Bull E.C. 3/82 para. 2.1.27).
187. Thirteenth Commission Competition Report (1983) p. 97, Bull E.C. 3/83 at p. 45 para. 2.1.84.
188. Thirteenth Commission Competition Report (1983) pp. 97, 98, Bull E.C. 11/83 at para. 2.1.49. See for another example Fagersta - Sandvik Tube AB Thirteenth Commission Competition Report (1983) at p. 99. The case is notable for the fact that it concerned two non-EEC (Swedish) firms who were deemed to be undertakings under Article 80 ECSC because they distributed steel products within the EEC via Community based subsidiaries.
189. See e.g. U.S. cases: Maple Flooring Manufacturers Association v. U.S. 268 U.S. 563 (1925) at p. 566; Tag Manufacturers Institute v. FTC 174 F. 2d 452 (1st Cir. 1949) at p. 462.
190. e.g. National Macaroni Manufacturers Association (1964) FTC Dkt 8524, 65 F.T.C. 583 at p. 612. During a period of shortage of durum wheat, an ingredient in the production of macaroni, members of the association agreed that millers would offer a blend of 50% scarce wheat and 50% other wheats. The association also recommended that members avoid producing low quality macaroni. This was held by the Federal Trade Commission to amount to an attempt to lower total industry demand for durum wheat and thereby prevent price competition for the available supplies.
191. Re Standards Committee of Direct Broadcasting Satellite Association, Business Review letter (12 October 1984) pp. 2, 3.
192. Article 1(a) of Regulation 2821/71/EEC O.J. 1971 L 285/46 (29 December 1971).
193. See Financial Times, December 15 1984.
194. IBM Settlement Case [1984] 3 C.M.L.R. 147.
195. See Commission answer to W.Q. No. 1414/84 O.J. 1985 C 93/97.
196. O.J. 1985 L 35/43. See generally Dassel and Isaacs, EEC Banking Law (1985) at pp. 50-53.

197. The Eurocheque System includes more than 15,000 banks in 39 European and Mediterranean States and includes more than 26m. eurocheque-card holders - see *ibid.*, at p. 44 para. 7 for details.
198. See e.g. Crousse - Hinds Co. FTC Dkt 4610, 46 F.T.C. 1114 (1950).
199. See Chapter 1 Section E for details.
200. S.I. 1969 No. 226 Schedule 1.
201. *ibid.*, Schedule 2.
202. S.I. 1984 No. 2031 concerning "standards of dimension, design quality or performance and arrangements as to the provision of information or advice to purchasers, consumers or users, contained in Decision XV-7 (as amended by Decision XVI - 4) taken pursuant to the Convention for the Reciprocal Recognition of Proof Marks for small arms done at Brussels on 1st July 1969 by the Permanent International Commission for the Reciprocal Recognition of proof marks for small arms.
203. S.I. 1983 No. 382.
204. No. 3769 Register of Restrictive Trade Practices, Hard Nonionic Detergents, (1974).
205. No. 4883, Register of Restrictive Trade Practices, The Tea Council: Catering Tea Grading Scheme (1982).
206. No. S.271 Register of Restrictive Trade Practices. Cheque Guarantee Cards Scheme (1983). Another "convenience" case is No. 3868 Register of Restrictive Trade Practices, "And the Best of British Campaign" (1978) - Firms ~~standardised~~ the guarantees they gave Hi-Fi equipment and made the guarantees transferable between themselves so that they would each honour guarantees provided by the other parties. See also No. S.412 Register of Restrictive Trade Practices, AA and RAC - Agreement whereby the AA and RAC standardised telephone boxes on new main roads, they also agreed as to siting and provision of new boxes. Under the agreement members of either organisation could use the facilities provided by the other.
207. Uniform Eurocheque O.J. 1985 L 35/43.
208. No. 3784 Register of Restrictive Trade Practices (1974).
209. No. 4508 Register of Restrictive Trade Practices, British Wool Marketing Board (1979).
210. O.J. 1968 C 75/3. [1968] C.M.L.R. D1
211. e.g. No. 3363 Register of Restrictive Trade Practices, Bournemouth Wholesalers Newspaper deliveries (1978) - two wholesalers share cost of joint delivery and transport system.
212. No. S.466 Register of Restrictive Trade Practices Agreement between Cleveland Co. Ltd., Texaco Ltd., Gulf (Oil) G.B. Ltd., Amoco and MMM Pipelines Ltd. (1984).
213. No. S.172 Register of Restrictive Trade Practices, Import Clearance Services at Heathrow (1978).

CHAPTER 13

INTELLECTUAL PROPERTY LICENSING

A. INTRODUCTION

Intellectual property licences, and in particular patent licences, are extremely common forms of contractual arrangement. In this chapter the compatibility of licensing agreements with competition law will be examined. The chapter ~~does not dwell upon~~ more general questions of intellectual property law. Thus, its relationship to free movement of goods and with Articles 30-36 EEC is touched on but not in detail.

The following are discussed in the chapter:

- Section B: Patent licensing in EEC law: General considerations.
- Section C: The Bloc-Exemption for Patent licensing: Regulation 2349/84/EEC.
- Section D: Patent licensing in UK law.
- Section E: Copyright licensing in EEC law.
- Section F: Copyright licensing in UK law.
- Section G: Trade mark licensing in EEC law.
- Section H: Trade mark licensing in UK law.
- Section I: Know-how licensing in EEC law.
- Section J: Know-how licensing in UK law.
- Section K: Licensing Intellectual Property to Sub-Contractors.

B. PATENT LICENSING IN EEC LAW: GENERAL CONSIDERATIONS

I. Legal Context

The principal consideration in respect of patent licensing in EEC law is now the bloc-exemption for certain categories of agreement: Regulation 2349/84/EEC.¹ This grants automatic exemption under Article 85(3) to various types of licence satisfying the criteria laid down in the Regulation. It also proceeds along certain basic lines, in particular it ~~follows~~ the reasoning of the European Court in Nungesser v. Commission (Maize Seed).² From this case three broad principles may be derived and which are relevant to the Regulation:³ First, a certain degree of protection is necessary for patent holders (licensors) and licensees to create a favourable climate for the transfer of new technology throughout the EEC and simultaneously to stimulate

and reinforce the R & D activities of firms which generate advanced techniques and new products; secondly, a balance must be struck between maintaining effective competition in the EEC and protecting the monopoly-based rights of holders of intellectual property; and thirdly, a law designed to regulate patent licensing must recognise the importance of legal security for contract partners.

II. Exclusive Licences and the Application of Article 85(1): "Open" and "Closed" licences

In Nungesser v. Commission the Court held that certain types of exclusive licence did not fall within Article 85(1).⁴ To be excluded the licence would have to be "open" i.e. a licence whereby the licensor agrees not to compete with the licensee in the licensed territory and not to grant additional licences for that territory, but which does not however afford the licensee absolute territorial protection i.e. protection from competition by other licensees and parallel importers. A license which seeks to protect the licensee from competition is a "closed" license and is subject to Article 85(1) EEC.⁵

"Open" exclusive licences do not therefore require notification. Though, caution should be adopted when considering the "open" - "closed" distinction since the European Court itself did not draw a black and white division between the concepts. The Court apparently viewed only certain types of "open" licence as outside the scope of Article 85(1). The criteria for the non-applicability of Article 85(1) would appear to be as follows:

- (i) the product is new on the market and users and consumers are unfamiliar with it;
- (ii) the product requires exclusivity to provide the licensee a degree of protection which is necessary to encourage the licensee to accept the licence and help offset research and development costs;
- (iii) the possibility of competition from other licensees and parallel importers remains; and,
- (iv) the licence is not concluded for an unduly long period of time.

The Commission has subsequently applied these considerations in negotiations with parties to licences.⁶ It is very important to appreciate from the outset that the principles in Nungesser v. Commission are considered to be of general application to all intellectual property rights and not just patents. Indeed the case itself concerned plant breeders' rights which are a sui generis species of intellectual property.⁷

III. Protecting Exclusive territories: Free Movement of Goods

(i) The problem

A problem of some complexity which will be briefly noted here is the extent to which holders of intellectual property rights may bring infringement proceedings to prevent parallel imports and to protect the integrity of geographical territories.⁸ Thus a patentee manufactures and sells the ~~protected~~ product in the UK but grants an exclusive license under a German patent to a licensee in Germany to manufacture and sell the products in Germany. A parallel importer in the UK travels to Germany where he purchases the product and brings it back to the UK for sale there, can the UK patentee commence an action against the parallel importer for infringement of his patent? In UK law the traditional position is that a patentee can control the use, exercise and sale of inventions deriving from the patent. EEC law, by contrast, views this situation as one of conflict between the patentees rights, on the one hand, and the principle of the free movement of goods on the other.⁹ In choosing between these two interests the European Court has given clear priority to the principle of free movement which is laid down in Articles 30-36 EEC. These provisions prohibit all quantitative restrictions on imports or exports (i.e. quotas) and all measures having equivalent effect. This latter notion of measures having equivalent effect has been defined very widely to include "... all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."¹⁰

(ii) The "Specific Subject Matter" of Intellectual Property and the Concept of Exhaustion of Rights

In considering intellectual property and competition law the Commission distinguish between rights deriving from the "specific subject matter" of the intellectual property and those not so deriving. Only the latter are subject to competition law. With respect to patents the patentees rights deriving from the specific subject matter of the patent include the right of first marketing.¹¹

However according to the European Court there comes a stage at which an intellectual property right becomes "exhausted" i.e. actions for infringement of the right will be impermissible where the right has become exhausted. Concerning patents the rule is that national protection for an invention may not be employed to prevent the importation into that national territory of parallel patented products which have already been marketed once by the patentee or with his consent in another Member State.¹²

"In relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements."

and,

"... an obstacle to the free movement of goods of this kind may be justified on the ground of protection of industrial property where such protection is invoked against a product coming from a Member State where it is not patentable and has been manufactured by third parties without the consent of the patentee and in cases where there exists patents, the original proprietors of which are legally and economically independent ... a derogation from the principle of free movement of goods is not, however, justified where the product has been put onto the market in a legal manner, by the patentee himself or with his consent, in the Member State from which it has been imported, in particular in the case of proprietor of parallel patents."¹³

IV. Compulsory Licensing

The Commission have intimated that infringement of Article 85 by a patentee does not give a third party a right to obtain a licence.¹⁴ The right to exploit or not to exploit a patent derives from the existence of the right itself and not from its exercise. Article 85 focuses upon exercise of the right. Though, under Article 86 EEC the Commission appear to consider that it is an abuse of dominance for an undertaking to refrain from licensing or otherwise disposing of intellectual property rights when hitherto licences or disposals have been made. This is particularly so where the acquirers of the right are competitors of the grantor and need the right in question in order to compete.¹⁵

Actions based upon Article 85 or 86 before the UK Courts are apparently more hopeful. The Court of Appeal has held that no injunction may be granted at full trial against an unauthorised user where the main licence is held to infringe Article 85. The unauthorised user may, however, be required to pay reasonable royalties to the patentee.¹⁶ Thus a third party may indirectly obtain a licence by unauthorised use coupled to subsequent payment of reasonable royalties.

C. THE BLOC-EXEMPTION FOR PATENTS LICENSING:
REGULATION 2349/84/EEC

Regulation 2349/84/EEC¹⁷ lays down criteria which if met enable a patent licensee to claim automatic exemption from the prohibition in Article 85(1) under Article 85(3). The Regulation is examined in detail below.

I. The Basic Exemption: Article 1

(i) Scope

Article 1 exempts patent licensing agreements, whether combined with know-how licences or not, to which only two undertakings are party. Patent licensing agreements are defined as: "agreements whereby one undertaking, the holder of a patent (the licensor), permits another undertaking (the licensee) to exploit the patented invention by one or more means of exploitation afforded by patent law, in particular manufacture, use or putting on the market."¹⁸ A patent licence need not necessarily be confined to these three activities. The Regulation mainly concerns the licensing of, and application for, patents which includes licenses issued in respect of national patents of the Member States, Community patents,¹⁹ and European patents granted for Member States.²⁰ However, the regulation extends beyond patents and includes further: utility models; applications for registration of utility models; 'certificats d'utilité' and 'certificats d'addition' under French law; and, applications for 'certificats d'utilité' and 'certificats d'addition' under French law. Additionally, the exemption applies to agreements for the exploitation of an invention if an application is made in respect of the invention for the licensed territory within one year from the date when the agreement was entered into.²¹

The Regulation covers agreements between a patentee and a licensee. It also covers agreements between a licensee and a sub-licensee. Further,

agreements for the assignment or acquisition of rights where the risks associated with exploitation are borne by the **assignor** are covered. Thus agreements whereby the **assignor** earns a royalty dependent upon the turnover of patented products attained by the assignee, or the quantity of such products manufactured, or the number of operations carried out employing the patented invention, are all exempt. Also covered are agreements in which rights or obligations are assumed by undertakings connected with the parties.²² Thus an assignment of the licensee's rights to a wholly owned subsidiary of the licensee is perfectly acceptable.²³

With regard to the geographical scope of the agreement exemption applies to a licence which contains obligations relating not only to territories within the Common Market but also to non-Member States.²⁴ However agreements for territories other than the EEC which have effects within the Common Market are subject to the Regulation.²⁵ Thus an agreement between X (a British firm) and Y (an Austrian firm) whereby Y is licensed to manufacture and sell products resulting from X's patent may be subject to EEC law if X imposes on Y an obligation to refrain absolutely from supplying customers situate outside of Austria with the patent product. If customers and users in the EEC have difficulty in obtaining the patent product in the EEC and are prevented from acquiring it from the Austrian licensee then the EEC market has been effected.

The exemption does not apply to agreements concerning sales alone. Such agreements, if exempt, fall within Regulation 83/83/EEC on bloc-exemption for exclusive dealing.²⁶ Thus if X (patentee) licenses Y to distribute on an exclusive basis the product X has manufactured within a given area the agreement must satisfy Regulation 83/83/EEC and not Regulation 2349/84/EEC.²⁷

As noted above the Regulation exempts only bilateral agreements. In addition the agreement must be between a grantor and a grantee, i.e. the parties cannot both be a grantor and grantee. Thus the Regulation does not cover: patent pools; reciprocal licensing whereby X licenses Y his patents and Y licenses X his patents;²⁸ reciprocal distribution agreements whereby X makes Y exclusive dealer for his patented products and Y makes X **the** exclusive dealer of his patented products. Furthermore, the Commission have refrained from extending the Regulation to licensing agreements entered into in connection with joint ventures, and, licences

in respect of plant-breeder's rights.²⁹ The Commission consider with these types of licence that they have insufficient experience of their operation to feel secure in according them automatic exemption.

(ii) Relationship with Know-how and trade marks

Patent licences often include provisions concerning know-how³⁰ and trade marks. Such mixed agreements allow the effective transfer of complex technology containing both patented and non-patented elements. Agreements of this nature are covered by the Regulation in defined circumstances. As regards know-how exemption applies where the technical knowledge is secret and helps the licensee to exploit more effectively the patent. Provisions in the patent licence concerning the communication of know-how are exempt only in so far as the licensed patents are necessary for achieving the objects of the licensed technology and as long as at least one of the licensed patents remains in force.³¹ The Regulation is silent as to the relative importance of know-how and patent hence the know-how need not necessarily be of secondary importance. The Regulation does not, however, provide exemption for pure know-how licences and, indeed the Commission have taken an equivocal approach to restrictive know-how licenses.³²

For a more detailed analysis of know-how see Section I below.

Where patent licences contain ancillary provisions relating to trade marks exemption applies with the proviso that the trade mark licence must not be used to extend the effects of the patent licence beyond the life of the patents. These ancillary licenses enable the patent licensee to identify himself within the contract territory as the manufacturer of the licensed product. This avoids the difficulty of the licensee having to enter a new trade mark licence with the licensor when the licensed patents expire in order not to lose the goodwill attaching to the licensed product.³³ (See below Section G for further details).

II. Permissible Restrictions: Article 1 (White clauses)

Article 1 enumerates restrictions which may be incorporated safely into patent licences without endangering the exemption. These "white clauses" are examined below. A clause of more limited scope than that specified below is, according to Article 1(3), stated to be exempt equally with the clause specified. If the clause in question goes beyond that noted below it is not exempt.

(i) Exclusive territories (Article 1(1)(1), (2))

Article~~1~~(1) permits: "an obligation on the licensor not to license other undertakings to exploit the licensed invention in the licensed territory, covering all or part of the Common Market, in so far and as long as one of the licensed patents remains in force."

Article~~1~~(2) permits: "an obligation on the licensor not to exploit the licensed invention in the licensed territory himself in so far and as long as one of the licensed patents remains in force." Thus the licensor can grant the licensee an exclusive territory and covenant that he, the licensor, will not compete with the licensee in that territory. Exclusive licences of this nature may fall within Article 85(1) but are suitable for exemption under Article 85(3) EEC.³⁴

Paragraph 11 of the preamble explains the Commission's policy on exclusivity clauses. Such clauses are not necessarily incompatible with competition rules where they are concerned with the introduction of a new technology in the licensed territory by reason of the scale of the research which has been undertaken and of the risk that is involved in manufacturing and marketing a product which is unfamiliar to users in the licensed territory at the time the agreement is made. This may also be the case where the agreements are concerned with the introduction and protection of a new process for manufacturing a product which is already known. The Commission continue to indicate that clauses satisfying these criteria ~~may~~ not even fall within Article 85(1). This is in reality an affirmation of the judgment of the European Court in Maize Seed.³⁵ To the extent that an exclusivity clause does not satisfy these economic criteria it will now be exempt nonetheless under Article 1.

The exemption applies irrespective of the size of the undertakings in question. The Commission (reluctantly) dropped size limitations from drafts of the Regulation.³⁶

According to Article 1(2) the exemption in Article 1(1)(2) applies only where the licensee manufactures the licensed product himself or has it manufactured by a connected undertaking or by a sub-contractor.

The exclusivity allowed under this provision may be **very effective** in the case of bulky, low value goods whose characteristics do not encourage parallel imports; however, such exclusivity may not be so valuable where the goods are small, light and high value. See Articles 1, 1(4)-(6) below.

(ii) Non-Competition clauses (Article 1(1)(3))

Article 1(2) permits the licensor to covenant not to compete with the licensee in the latter's territory. Article 1(1)(3) permits: "an obligation on the licensee not to exploit the licensed invention in territories within the Common Market which are reserved for the licensor, in so far and as long as the patented product is protected in those territories by parallel means." The Commission explain, in paragraph 12 of the preamble, that these clauses are economically desirable in that they focus the efforts of the parties on certain areas and afford the parties a degree of security: "... they make patentees more willing to grant licences and licensees more inclined to undertake the investment required to manufacture, use and put on the market a new product or to use a new process, so that undertakings other than the patentee acquire the possibility of manufacturing their products with the aid of the latest techniques and of developing these techniques further. The result is that the number of production facilities and the quantities and quality of goods purchased in the Common Market are increased." The non-competition clause may only be included in the license in so far as it relates to territories in which the licensor has patent protection and has not granted any licences. Where several patents have been licensed the clause is operative so long as one of the licensed patents remains in force, but not beyond.

Under Article 1(2) , Article 1(1)(3) ~~only~~ applies where the licensee manufactures the licensed product himself or has it manufactured for him by a connected undertaking or sub-contractor.

(iii) Protection for licensees against each other (Article 1(1)(4), (5) and (6))

The Commission recognise that licensees require a degree of protection from each other. Licensees protected from competition inter se may focus their efforts in a more intensive manner thereby maximising the chances of effective exploitation and utilisation of the patent. However, the Commission and indeed the European Court have refused to countenance absolute territorial protection whereby licensees are protected from all competition, in particular from parallel importers.³⁷

The Regulation hence lays down strict rules for exclusivity and protection of licensees from each other. At the extreme under Article 1(1)(6) the licensor may grant licensees protection from any competition from other licensees for up to five years from the time the product is first put on the market within the EEC. Protection in

this sense means protection from "active" and "passive" competition. "Active" competition occurs where a licensee in one territory markets the goods in the territories of other licensees; undertakes specific advertising aimed at those territories; or establishes any branch or maintains any distribution depot in those territories. "Passive" competition occurs where a licensee simply responds to unsolicited requests from users or resellers established in other territories. Article 1(1)(6) does not, however, allow the licensor to prohibit the licensee to supply any customer in his own territory who intends to export the goods for resale in another licensee's territory i.e. a parallel importer.

Article 1(1)(4) exempts obligations on the licensee not to manufacture or use the licensed product, or use the patented process or the communicated know-how in other licensed territories than his own. This obligation is exempt in so far, and as long, as the licensed product is protected in those territories by parallel patents. This obligation does not however prevent one licensee manufacturing in his own territory and transporting the licensed product over the border into another licensee's territory there. Article 1(1)(5) exempts obligations partially preventing this situation. The provision allows the licensor to prohibit the licensee from undertaking "active" selling (as defined above) outside of his territory. The obligations in Article 1(1)(4) and (5) do not prevent competition from parallel importers: X who is situated in the UK which is served by L^1 travels to France which is served by L^2 ; X purchases the licensed product from L^2 and takes it back to the UK for sale there in competition with L^1 . It may well be that L^2 is considerably cheaper or produces better quality goods or provides better terms and conditions than L^1 so that it is commercially viable for X to purchase in France for export to the UK. Clauses exempt under Articles 1(1)(4) and (5) are valid for the duration of the agreement.

If a licensor wishes to protect licensees further and prohibit even passive sales he may do so under Article 1(1)(6) noted above but only for a period of five years from the date when the product is first offered for sale by either the licensor or licensee. At the end of this period licensees must be free to supply the product in the territories of other licensees in response to unsolicited requests from users or reseller (parallel importers) situated in those territories (i.e. "passive" sales).³⁸ Thus L^1 in the UK may refuse to satisfy an unsolicited order from a buyer in Germany. Though if the buyer travels to the UK to buy or places his order through an agent or intermediary in the UK the Licensor cannot prevent L^1 from supplying the buyer. Article 1(6) thus falls short of absolute territorial protection though it may give considerable protection in practice where the goods are bulky and of relatively low value i.e. not easily exportable.

Under no circumstances can the licensor attempt to prevent parallel imports, See Article 3(1) below.

According to Article 1(2) exemption in Article 1(1)(5) and (6) (but not Article 1(1)(4)) only applies where the licensee **manufactures** the licensed product himself or has it manufactured by a connected undertaking or sub-contractor.

(iv) Trade Marks (Article 1(1)(7))

This provision exempts, "An obligation on the licensee to use only the licensor's trade mark or the get up determined by the licensor to distinguish the licensed product, provided that the licensee is not prevented from identifying himself as the manufacturer of the licensed product." Article 1(1)(7) does not expressly exempt a pure trade mark licence. The trade mark licence must be ancillary to the patent licence and must not be used to extend the effects of the patent licence beyond the life of the patent. The licensee must not be prevented from identifying himself as the manufacturer of the licensed product.

III. Permissible Clauses not generally falling within Article 85(1): Article 2 (White Clauses)

Article 2 lists typical licence clauses that are generally not considered to fall within Article 85(1). Where such clauses are within Article 85(1) because of particular economic or legal circumstances they will be exempt under Article 85(3). The list is given by the Commission for purposes of legal certainty but nonetheless is not exhaustive. Article 2(1) states that Article 1 shall apply notwithstanding the presence of any of the following obligations:

(i) Purchase or Procurement obligations

Article 2(1)(1) permits an obligation on the licensee to procure goods or services from the licensor or from an undertaking designated by the licensor. However, this obligation is only exempt in so far as such products or services are necessary for a "technically satisfactory exploitation of the licensed invention." In Vaessen - Moris³⁹ the Commission refused exemption to a patent licence containing a purchase obligation on a licensee of a process and device used in sausage meat manufacture. The obligation was on the licensee also to purchase casings from the patentee. The Commission decided that the clause prohibited the licensee from purchasing casings from other suppliers at more favourable prices. Moreover the tie-in between patent licence and casings supply was not essential to the proper exploitation of the

patent since casings provided by rival suppliers were perfectly adequate for use with the patented process and device. It would appear that the Regulation merely follows earlier Commission policy on tying within patent licenses i.e. that it is justifiable and not restrictive where the tied product or service (e.g. maintenance) is reasonably necessary for satisfactory exploitation of the patent. The tied product or service need not necessarily be essential to the patent; ties are justified in lesser circumstances. No definition is given of "technically satisfactory exploitation".

(ii) Minimum royalties, production quantities or number of operations

Article 2(1)(2) permits an obligation on the licensee to: (a) pay a minimum royalty; (b) produce a minimum quantity of the licensed product; (c) carry out a minimum number of operations exploiting the licensed invention.

(a) Royalties: the obligation to pay royalties is rarely within Article 85(1) even where the royalties demanded are excessive since Article 85(1) is not appropriate for curing or redressing commercial misjudgments. Though, it will restrict competition where the licensee has to pay royalties on its own unprotected products; such an obligation has no connection with the licensed patent.⁴⁰ Moreover, where the licenced product is an integral component of a larger product sold by the patentee and the royalty is based upon the sales price of the whole product then the obligation to pay a royalty on an unprotected product may be legitimate.⁴¹ In more general terms royalties may cause problems in a number of situations which warrant brief mention. Thus differential royalties whereby the Licensee pays more if he exports than if he sells domestically may be viewed as attempts by the licensor to discourage exports. Similarly a scale of royalty payments which increases as the licensee's output increases may also be viewed as an attempt by the licensor to limit the licensee to his domestic territory. Conversely sliding scales whereby royalties decrease as output increases are acceptable since they do not deter production and are compatible with "best endeavours" clauses which are frequently inserted in licences.

(b) Minimum quantities: obligations of this nature protect the licensor against under-use by the licensee and perhaps against the threat of compulsory licensing. If the latter fails to meet the quantitative requirement he will be liable for breach of contract to the licensor. The clause minimises the risk for the licensor. Article 2(1)(3) only applies to minima not maxima, the Commission view maxima limitations as curbs on productivity which are not exemptable.⁴²

(c) Minimum number of operations: minimum numbers of operations may be treated in the same way as minimum quantities. The same proviso as to maxima applies.

(iii) Restrictions on technical use

Article 2(1)(3) permits an obligation on the licensee to restrict his exploitation of the licensed invention to one or more technical fields covered by the licensed patent. The licensor may thus restrict the licensee's use of the patent to a major or minor field of application. The licensor may thus grant different licences to different licensees limiting their use of the invention to fields in which they are experienced or have greatest production capacity. The same principle applies to other intellectual property rights.

(iv) Expiry of the agreement

Article 2(1)(4) permits an obligation on the licensee not to exploit the patent after termination of the agreement in so far as the patent is still in force. It will of course be permissible to grant a licence for a period less than the lifetime of the patent. It restrains competition if the obligations in the agreement extend beyond expiry of the patent. When the right to protection expires restrictions on the use of that right are likewise no longer protected.⁴³

However, there would appear to be no objection to an obligation on the licensee to pay royalties following expiration of the patent where the royalties arose for payment in instalments and these have not yet finished. Thus if X licenses Y a patent for 5 years but, as a kindness to Y, staggers the payment of royalties over a 7 year period this should be exempt. Article 2(4) it may be noted speaks only of exploitation of the patent and not payment in respect of exploitation.⁴⁴

Where the patent licence includes provisions for the licensing of know-how and/or trade marks these, being ancillary to the main grant, must expire with the licence for the patent. If they exceed the licence for the patent the agreement becomes one for the licence of know-how or a trade mark and hence is not exempt.

(v) Prohibition on sub-licensing or assignment

Article 2(5) permits obligations on the licensee not to grant sub-licences or assign the licence. It follows that a clause laying down conditions under which a licensee may sub-license is also exempt. This is a less restrictive version of the ban on sub-licensing so is included on the "more limited scope" rule (Article 2(2)). This principle applies to all forms of intellectual property, it is the holders right to determine with whom he shares his rights.⁴⁵

(vi) Identification of Patentee on licensed product

Article 2(1)(6) permits obligations on the licensee to mark the licensed product with an indication of: (a) the patentee's name;

(b) the licensed patent; or (c), the patent licensing agreement. If the patentee does not intend to commence marketing the licensed product himself until after expiry of the licence agreement then he may wish to have his name or mark associated with the product from first marketing onwards. The Commission recognise that obligations on the licensee to allow identification of the patentee on the product by a distinctive mark may have "only the aim of facilitating a control by [the patentee] of the quality and quantity of the products covered by the agreement."⁴⁶

(vii) Non-disclosure of know-how

Article 2(1)(7) permits obligations on the licensee not to divulge know-how communicated by the licensor. This obligation may extend beyond expiry of the agreement. It is generally presumed that such an obligation remains valid until such time as the know-how enters the public domain. At that time a restriction on the licensee might unduly restrict him vis-a-vis competitors who are free to do as they please with the know-how.⁴⁷ A not uncommon clause provides that know-how shall remain secret until such time as the licensee proves that it has entered the public domain. In practice this can be an onerous and expensive burden of proof. Such a clause is not specifically in either the "white" or "black" categories of clause which might suggest that adoption of such a clause renders the licence notifiable to the Commission probably using the opposition procedure. However, it is arguable that such a clause is within the "white" obligation and hence also exempt.

(vii) Infringement clauses (excluding no challenge clauses)

Article 2(1)(8) permits obligations on the licensee: (a) to inform the licensor of infringements of the patent; (b) to take legal action against an infringer; (c) to assist the licensor in any legal action against an infringer. However, "no challenge clauses" are not exempt. These prohibit the licensee from challenging the validity of the patents covered by the agreement during its currency. The Commission do not consider such clauses as suitable for exemption under Article 85(3). In Vaessen - Moris the Commission, confirming earlier decisions, stated of a no challenge clause: "... it is not a requirement imposed by the patent. Rather it constitutes a contractual restriction of competition in that it deprives the sublicensee of the possibility, which is available to everyone else, of removing an obstacle to his freedom of action in the commercial field by means of an action for revocation of the patent. This is no less the case where the relevant authority examines an application for novelty and degree of inventiveness before granting a patent, since such an examination does not affect the right

of undertakings which might profit from such non-existence of the patent to oppose it or bring actions for its revocation. Even if it is the licensee or sublicensee who is best placed to attack the patent on the basis of information given to him by the licensor, the public interest in the revocation of patents which ought not to have been granted requires that the licensee and the sublicensee should not be deprived of this possibility."⁴⁸

Incorporation of a no-challenge clause expressly entails loss of bloc-exemption under Article 3(1). Though see commentary *below* on the licensor's right to terminate the licence in the event of challenge.

(ix) Minimum quality

Article 2(1)(g) permits obligations on the licensee to observe minimum quality requirements for the licensed product. However, such obligations must be necessary for a technically satisfactory exploitation of the licensed invention. An ancillary obligation on the licensee to allow the licensor to perform monitoring checks is equally permissible. With respect to minimum quality the Commission has stated that such clauses do not restrain competition because they are "... only designed to allow an adequate and technically adequate exploitation of the rights conferred by patents on their holder."⁴⁹ In decided cases the Commission has accepted as non-restrictive obligations on the licensee to manufacture so as to render the licensed product compatible with the licensors own products⁵⁰ and to manufacture employing all due care and attention.⁵¹ Licensees may be required to comply with design plans and drawings.

(x) Improvements and communication of experiences (Grant/Licence back clauses)

Article 2(1)(10) permits obligations on the parties to exchange details of experience gained in exploiting the licensed invention. An obligation on the licensee to swap experiences with other licensees, might in certain market contexts be exempt. Adoption of such a clause might render use of the opposition procedure appropriate. As regards obligations on the parties to grant one another licences in respect of improvements and new applications Article 2(1)(10) says these are not restrictive. With regard to improvement and experience grant backs they are not restrictive so long as they are not exclusive.⁵² Improvement licenses must not be used, however, to artificially extend the life of the agreement. An agreement which is to remain current "for the life of the most recent original or improvement patent, whether or not already held", restrains competition. The clause enables the

licensor to extend unilaterally the duration of the agreement, it has restrictive consequences where combined with other restraints on competition e.g. exclusivity, export bans, no challenge clauses, non-competition clauses. Thus, the improvement patent licence should not extend beyond the currency of the last patent granted at the time the licence was first entered.⁵³ If the licensee is obliged to permit the licence to register the licensee's improvements in the licensor's name or in joint names this will almost certainly be treated as if it were an exclusive licence. The same applies if the licensor is also obliged to grant back to the licensee royalty free licences.

It appears that for both communications of experience and improvement licences obligations must be mutual i.e. on licensor and licensee.⁵⁴ Article 2(1)(10) seems to require this duality though precisely why is unclear since an obligation on the licensee to grant back improvement licences may be offset by his having to pay reduced royalties i.e. the obligation may merely be a function of the consideration paid for the license.

(xi) Most favoured licensee's terms

Article 2(1)(11) permits obligations on the licensor to grant the licensee any more favourable terms that the licensor may grant to another undertaking after the agreement is entered into. It is possible that such a clause might restrain competition though where it does it will still be bloc-exempt: "The licensor's obligation to extend to the original licensee any more favourable terms subsequently granted to other licensees would not in general dissuade the licensor from granting further licences to third parties. In specific cases, however, particularly where the market situation was such that the only way to find other licensees was to grant them more favourable terms than those granted to the first licensee, this obligation could be an obstacle to the granting of further licences and therefore constitute an appreciable restriction of competition."⁵⁵

IV. Non Permissible Restrictions: Article 3 (Black Clauses)

Exemption is not given **automatically** for certain clauses. Incorporation of these clauses gives rise to the need to notify; the "opposition procedure" is not available to licences containing such clauses. However, individual exemption granted following notification in the usual manner may be available.

56

(i) No challenge clauses

Article 3(1) denies exemption where, "The licensee is prohibited from challenging the validity of licensed patents or other industrial or commercial property rights within the Common Market belonging to the licensor or undertakings connected with him, without prejudice to the right of the licensor to terminate the licensing agreement in the event of such a challenge." No challenge clauses have already been noted above.⁵⁷ It is pertinent here to add that according to Article 3(1) no consequences attach to a licensor's termination of the licensee's license should the latter decide to challenge the former's rights. If the licensor can terminate a licence because the licensee challenges its validity then this may deter licensees from attempting a challenge. Thus a licensor might be well advised to incorporate into the licence a right to terminate the licence exercisable by the licensor in the event of a challenge.

(ii) Extension of the agreement beyond expiry of patent

Article 3(2) provides that no exemption lies where, "the duration of the licensing agreement is automatically prolonged beyond the expiry of the licensed patents existing at the time the agreement was entered into by the inclusion in it of any new patent obtained by the licensor, unless the agreement provides each party with the right to terminate the agreement at least annually after the expiry of the licensed patents existing at the time the agreement was entered into, without prejudice to the right of the licensor to charge royalties for the full period during which the licensee continues to use know-how communicated by the licensor which has not entered into the public domain, even if that period exceeds the life of the patents." Agreements which last for the lifetime of a patent or for a shorter period do not generally infringe Article 85(1).⁵⁸ Conversely, Article 3(2) provides that no exemption lies where the licensor attempts to restrict the licensee once the intellectual property has expired.⁵⁹ However, it is notable that Article 3(2) lays down no absolute rule. Exemption may still be claimed provided that the agreement does not "automatically" extend beyond expiry of the first patents. Thus, the agreement may be prolonged provided the parties include termination clauses which may be activated at regular periods of 12 months or less. These rules, however, have no bearing on

licensee's obligation to pay full royalties for the use of know-how communicated to him by the licensor. Indeed the obligation to pay such royalties may extend beyond the life of the patents and continues until such time as the know-how enters the public domain at which point the licensee has a right to use it independent of the grant by the licensor.

Where there is a legal doubt over the validity of the patent it is not uncommon for royalties to be based primarily on use of the know-how and not the patented invention. This minimises the economic risk to the licensor of a successful challenge to the patent.

Where the original licence is based upon the grant of several patent rights then the wording of Article 3(2) implies that the agreement prima facie lapses (subject to permissible extension by inclusion of termination clauses) when the last of the originally licensed patent rights expires.

The most common situation envisaged by Article 3(2) above is extension of the agreement by inclusion of improvement patents. The Commission has hitherto condemned a clause providing that the agreement would remain in force, "for the life of the most recent original or improvement patent, whether or not already held."⁶⁰ The Regulation demonstrates that the Commission now takes a less strict line and allows such clauses where ameliorated by periodic termination clauses.

(iii) Non Competition Clauses

Article 3(3) provides that no exemption lies where "one party is restricted from competing with the other party, with undertakings connected with the other party or with other undertakings within the Common Market in respect of research and development, manufacture, use or sales, save as provided in Article 1 and without prejudice to an obligation on the licensee to use his best endeavours to exploit the licensed invention."⁶¹ The Commission do not consider non-competition (or no-dualling clauses) to be exemptable:⁶² "A non-competition restriction could prevent a licensee from extending his product range and closely bind his future to that of a licensed patent. Consequently, a licensee so tied might have to go out of business when the licensed technology becomes obsolete. Non-competition prohibitions can have the effect of not only strengthening a monopoly position of a patentee, but also of weakening competition between manufacturers of substitute products. A licensee might no longer have worthwhile prospects in carrying out independent development. Accordingly, the Commission regards non-competition provisions as covered by Article 85(1). Possibilities of exemption under Article 85(3) could only arise in special situations, particularly cases relating to specialisation agreements."⁶³ However note that Article 3(3) is without prejudice to the licensee's duty to

use best endeavours i.e. the licensor has a valid interest in ensuring full exploitation by the licensee. How this may be ensured where the licensee carries dual obligations is uncertain. This ~~provision~~ does not prevent the inclusion of "best endeavours" clauses; it may well be up to national courts to reconcile the conflicts that may arise. Adoption of minimum performance criteria might provide a solution.

(iv) Royalty payments in respect of unprotected rights

No exemption lies where, "the licensee is charged royalties on products which are not entirely or partially patented or manufactured by means of a patented process, or for the use of know-how which has entered into the public domain otherwise than by the fault of the licensee or an undertaking connected with him"⁶⁴ Clauses providing for royalties should be limited to protected rights only. Thus they may cover fully and/or partially protected products **manufactured** by a patented process and know-how until such time as it enters the public domain. Where the licensee has, by default, allowed the know-how to enter the public domain the obligation to pay royalties remains presumably until such time as the know-how might reasonably have been expected to become public. This time period may in the Commission's opinion be quite short in **cases** of rapid technological advance: "In view of the rapid development of technology in polyurethane chemistry, it may be questioned whether such know-how has at the present time sufficient economic value to justify its continued protection by an obligation of secrecy."⁶⁵ Article 3(4) continues to provide that the preceding text (above) is "... without prejudice to arrangements whereby, in order to facilitate payment by the licensee, the royalty payments for the use of a licensed invention are spread over a period extending beyond the life of the licensed patents or the entry of the know-how into the public domain."

(v) Limitations on quantity or number of operations

Article 3(5) provides that no exemption exists where "the quality of licensed products one party may manufacture or sell or the number of operations exploiting the licensed invention he may carry out are subject to limitations." Whereas the licensor may impose minimum requirements on the licensee maximum requirements may not be imposed. See IV(ii) above for details. Limitations on production may have the same effect as an export ban and are accordingly equally unacceptable.⁶⁶

(vi) Prices and discounts

No exemption lies under Article 3(6) where, "one party is restricted in the determination of prices components of prices or discounts for the licensed products." The restriction is usually imposed upon the licensee in the form of a fixed sale price. Such a clause always restricts competition and is unlikely to receive individual exemption.⁶⁷

(vii) Customer control restrictions

No exemption lies under Section 3(7) where, "one party is restricted as to the customers he may serve, in particular by being prohibited from supplying certain classes of user, employing certain forms of distribution or, with the aim of sharing customers, using certain types of packaging for the products, save as provided in Article 1(1)(7) and Article 2(1)(3)." Paragraph 23 of the preamble states unhelpfully that non permissible obligations "... include restrictions imposed on the parties regarding prices, customers or marketing of the licensed products or regarding the quantities to be manufactured or sold, especially since restrictions of the latter type may have the same effect as export bans." Article 1(1)(7) essentially permits obligations on the licensee to use only the licensors trade mark or get up as determined by the licensor to distinguish the licensed product. Article 2(1)(3) is more problematic, it provides that an obligation on the licensee to restrict his exploitation of the licensed invention to one or more technical fields of application is not generally restrictive of competition. If X licenses Y to use his patent for certain specific technical uses only then this will inevitably limit Y's capacity to supply certain customers who are interested in products other than those Y is permitted to produce but which derive from the patent. The effect of a field of use restriction may hence be to restrain the licensee as to customers. However, it appears that this is accepted as an inevitable consequence and does not threaten the exemption. Precisely where the divide between Articles 2(1)(3) and 3(7) lies is unclear; if the parties misuse Article 2(1)(3) and disguise customer restrictions as field of use restrictions the Commission might nonetheless treat the clause as a customer restraint.⁶⁸ The Regulation makes it clear that customer restrictions may take a number of forms. Thus, restrictions on categories of user, e.g. only wholesalers, are not exempt. Likewise restrictions on the forms of marketing e.g. only through specialist retailers and not multifunction supermarkets, are

non exempt. Equally restrictions on the packaging used which have as their object the sharing of customers are non exempt.

(viii) Assignment back of improvement patents

No exemption lies where, "the licensee is obliged to assign wholly or in part to the licensor rights in or to patents for improvements or for new applications of the licensed patents". Clauses providing for compulsory assign back are viewed by the Commission as potential evidence of exploitation by the licensor of unequal bargaining power i.e. the licensee accepts such restrictions reluctantly in order to secure the licence. The Commission complain that the licensor obtains an unjustified competitive advantage by such terms.⁶⁹ This provision must be read in the light of Article 2(1)(10) which permits a mutual obligation on the parties to grant to each other on a non-exclusive basis improvement licences and to communicate to each other experience gained. It should be noted that Article 2(1)(10) does not cover anything other than reciprocal obligations. Where parties wish to include a ~~a~~ *compulsory* clause they should notify their agreement, not every compulsory assign back clause restrains competition so that in appropriate circumstances negative clearance might be given. Thus a clause which requires the licensee to grant non-exclusive improvement licences to the licensor and through him to all other licensees may not be restrictive where the licensee is at that time the only licensee.⁷⁰ It may be restrictive if the licensee in question is not the sole licensee and by the clause he is forced to share his improvement with rival licensees.⁷¹

(ix) Excessive tying clauses (package licensing or patents)

No exemption lies, under Article 2(1) where, "the licensee is induced at the time the agreement is entered into to accept further licences which he does not want or to agree to use patents, goods or services which he does not want, unless such patents, products or services are necessary for a technically satisfactory exploitation of the licensed invention." As with compulsory grant back obligations (above) the Commission perceive tying as evidence of exploitation by the licensor of superior bargaining power.⁷² Tying is considered not to restrain competition where it is related to quality control but is considered to be restrictive, and unsuitable for exemption, where it has no reasonable connection to quality control.⁷³ In Campari (a case on trademarks) the Commission accepted a tying clause that sought to maintain the quality of the licensed product and thereby the licensors

reputation: "According to information provided by the parties, the standards enforced do not oblige the licensees to obtain supplies of albumin or bitter orange essence from any particular source, but only to choose between different products on the basis of objective quality considerations. This does not, however, apply to the colouring matter and the herbal mixtures, where the licensor's legitimate concern to ensure that the product manufactured under licence has the same quality as the original product can be protected only if the licensees obtain all their supplies from it."⁷⁴ The fact that the case concerned trademarks does not effect the principle that tying may be legitimate to protect the quality of an ultimate product.

The tie-in alluded to in Article 3(9) need not be a strict contractual requirement i.e. licensee must take product X in conjunction with license, the provision speaks of licensees being "induced". Thus in Complaint in Plastics Industry⁷⁵ patentees granted licences royalty free if certain non-patented products were purchased from them but charged a royalty if the products were purchased from rival suppliers. The parties amended their practice before the Commission issued any decision. Thus, it is a tie-in if the licensee is not required to purchase a secondary product, service etc. from the licensor but does so because of economic 'persuasion'.

(x) Prohibitions on passive sales

No exemption lies under Article 3(10) where, "without prejudice to Article 1(1)(5), the licensee is required, for a period exceeding that permitted under Article 1(1)(6), not to put the licensed product on the market in territories licensed to other licensees within the Common Market or does not do so as a result of a concerted practice between the parties." This provision merely buttresses the provisions of Article 1(1)(5) and (6) for discussion of which see above.

(xi) Creation of obstacles to parallel imports

According to Article 3(11) no exemption lies where,

"one or both of the parties are required:

(a) to refuse without any objectively justified reason to meet demand from users or resellers in their respective territories who would market products in other territories within the Common Market;

(b) to make it difficult for users or resellers to obtain the products from other resellers within the Common Market, and in particular to exercise industrial or commercial property rights or take measures so as to prevent users or resellers

from obtaining outside, or from putting on the market in, the licensed territory products which have been lawfully put on the market within the Common Market by the patentee or with his consent; or do so as a result of a concerted practice between them."⁷⁶

These provisions act as a counterweight to Article 1(1)(4)-(6) which permits licensors to limit the extent to which licensees compete with each other. Thus, irrespective of Article 1 the licensees must be free to supply customers in their own territories who are intending to parallel import the goods into the territory of another licensee. Paragraph 13 of the preamble links this provision to the requirement in Article 85(3) EEC that consumers be allowed a fair share of the resulting benefit resulting from an improvement in the supply of the licensed products on the market: "To safeguard this effect ... it is right to exclude from Article 1 cases where the parties agree to refuse to meet demand from users or resellers within their respective territories who would resell for export, or to take other steps to impede parallel imports, or where the licensee is obliged to refuse to meet unsolicited demand from the territory of other licensees (passive sales). The same applies where such action is the result of a concerted practice between the licensor and the licensee." Thus licensees may not be prohibited from supplying exporters. Likewise attempts by either party to bring actions for infringement of the patent or of other proprietary rights licensed as ancillary to the main patent (e.g. trademarks), will render the agreement not automatically exempt.

The Commission have reinforced their objections to attempts to prevent parallel imports by repeating the wording of Article 3(11) in Article 9(5). This provision allows the Commission to withdraw an exemption that would otherwise exist where the parties seek to hinder parallel imports.

(xii) Problems with interpreting Article 3: Guidelines and codes of conduct

Article 3 discussed above is complex, it extends beyond a mere enumeration of "black" clauses to "black" factual situations which have little bearing on the existence or otherwise of a particular clause. Article 3(11) which covers obstacles to parallel importers is an example, such obstacles might derive purely from the licensee's unilateral conduct and not from any express clause in the licence. Advisers to licensors and licensees may thus consider drafting guidelines or codes of conduct setting out permissible and non-permissible conduct for their clients. This would

help minimise the possibility of a licence starting life as exempt but evolving into a non-exempt agreement requiring notification. Equally, it may minimise the possibility of the Commission unilaterally withdrawing exemption from a license under Article 9 (see below).

V. Extension of Exemption to Licences not Expressly covered: The "Opposition Procedure", Article 4

Article 4(1) extends the exemption to agreements whose clauses are not expressly covered by Articles 1 and 2 (the white clauses) but which contain no clauses prohibited by Article 3 (black clauses). Agreements of this nature may be notified to the Commission in accordance with the "opposition procedure" outlined in Article 4 and thereby may receive accelerated treatment. In essence, exemption automatically extends to the agreement if no opposition to it has been raised within a six month period commencing from the date of notification. Details of the "opposition procedure" are given in Chapter 7 Section E.

VI. Types of Licence not Exempt: Article 5

The Regulation is not all embracing, it expressly excludes from bloc-exemption certain categories of agreement. In paragraph 8 of the preamble the Commission explain: "Since the experience so far acquired is inadequate, it is not appropriate to include within the scope of the Regulation patent pools, licensing agreements entered into in connection with joint ventures, reciprocal licensing or distribution agreements, or licensing agreements in respect of plant breeder's rights."

(i) Patent pools

The Regulation does not apply, "to agreements between members of a patent pool which relate to the pooled patent." The Commission are generally unsympathetic to patent pooling particularly where the patentees are economically powerful. They object that, first, pooling eliminates competition between the parties as regards technical innovation, and secondly, by concentrating a substantial "package" of know-how in the parties hands pooling encourages purchasers to deal with the pool to the exclusion of other suppliers. The pool hence creates entry and expansion barriers.⁷⁷ Likewise an agreement between undertakings to jointly purchase and exploit certain patents which are essential to the operation of a certain market restricts competition

where the resultant pool excludes from the relevant market firms not belonging to the group. Such pools may be acceptable where they are willing to grant licences free of restriction and on reasonable terms to all other manufacturers in the Community.⁷⁸ A pool that requires members to surrender their rights upon leaving but which allows remaining members to retain the rights they have enjoyed in respect of the departing members patents infringes Article 85(1) EEC. Such a pool deters exit from it and hence hinders the freedom of firms to develop technology without having to share it with competitors.⁷⁹

Patent pools are hence outside of the Regulation and, in practice, may experience difficulty in obtaining individual exemption. Pools between small or medium sized undertakings which enable the members to compete more effectively with much larger competitors may be exemptable.⁸⁰

(ii) Licences in the context of a joint venture

The Regulation does not apply, "to patent licensing agreements between competitors who hold interests in a joint venture or between one of them and the joint venture, if the licensing agreements relate to the activities of the joint venture." Licensing issues related to joint ventures will usually arise in the context of joint R & D ventures. The Regulation by this provision avoids an overlap between the bloc-exemptions on R & D and on patent licensing. The bloc-exemption for R & D is examined in Chapter 12 Section E. Likewise such issues might arise in the context of specialisation agreements, the Commission has enacted a bloc-exemption for such joint ventures, this is examined in Chapter 12 Section F. The patent licensing bloc-exemption does apply however where the licensing agreement is unrelated to the activities of the joint venture.

(iii) Reciprocal licences

The Regulation does not apply, "to agreements under which the parties albeit in separate agreements or through connected undertakings, grant each other reciprocal patent or trade mark licences or reciprocal sales rights for unprotected products or exchange know-how, where the parties are competitors in relation to the products covered by those agreements." The Regulation does not thus extend to reciprocal licensing between competitors. Reciprocal licensing between non-competitors would appear to be exempt. In deciding whether reciprocal licences exist the Commission will not examine the form of the licences they examine the overall effect. Thus if X and Y exchange licenses using two separate

licensing agreements the Commission ~~may~~ view the agreements conjunctively as a single scheme, not disjunctively as two separate licences which may each be exempted.

(iv) Plant breeders rights

The Regulation does not apply to, "licensing agreements in respect of plant breeder's rights."⁸¹

(v) Future Commission policy

The agreement types noted above may obtain individual exemption. The Commission have intimated that bloc-exemption might be provided for these types of licence in the future.⁸²

VII. Withdrawal of Exemption: Article 9

The Commission may, in exceptional cases, withdraw the bloc-exemption from a particular case by formal decision where it considers that an agreement has effects that are incompatible with Article 85(3) EEC. The following are examples of cases where exemption might be withdrawn; the enumeration is not exhaustive:

(i) Arbitration awards leading to restrictive settlements

The Commission provide that exemption may be withdrawn where restrictive consequences derive from an arbitration award.⁸³ A clause requiring parties to submit disputes to arbitration has been held not to restrain competition.⁸⁴ However, arbitration schemes may be a device for maintaining a restrictive agreement and hence the Commission is cautious of them.⁸⁵ The existence of an arbitration clause in a licence is not a bar to scrutiny by the Commission.⁸⁶

(ii) Inter-brand competition ineffective

Exemption may be withdrawn where, "the licensed product or the services provided using a licensed process are not exposed to effective competition in the licensed territory from identical products or services or products or services considered by users as equivalent in view of their characteristics, price and intended use."⁸⁷ The Commission consider as significant in assessing a licence the extent to which the parties are subject to competition from competing brands or substitutes. Where such competition is effective it will act as a pressure on the licensor and licensee to behave competitively; strong inter-brand competition is hence a form of guarantee for the consumer. It does not follow that exemption will be withdrawn in every case where inter-brand

is weak. X might invent and patent a revolutionary new product which has no substitutes which he licenses to Y. Simply because X is innovative and efficient is no reason to deny him exemption. If X abused his market power then the abuse in conjunction with the lack of inter-brand rivalry might warrant withdrawal of exemption. Such a case might be suitable for review under Article 86 EEC as well.

(iii) Licensee fails to effectively exploit licence: termination rights

Exemption may be withdrawn where, "the licensor does not have the right to terminate the exclusivity granted to the licensee at the latest five years from the date the agreements was entered into and at least annually thereafter if, without legitimate reason, the licensee fails to exploit the patent or to do so adequately." Exclusivity clauses in licences are not per se restrictions under Article 85(1) where they are necessary to facilitate the market penetration of a new product; such clauses help overcome the risks inherent in marketing new products and accordingly may ultimately lead to increased, not reduced, levels of competition if a new product is successfully launched. However, if the licensee proves ineffective as a vehicle for exploitation of the invention the licensor may wish to seek a more effective undertaking to grant a licence to. Indeed, successful penetration of the market may depend upon the licensor being able to switch licensees. Legally, if the desired fruits of the licence do not materialise, and show no prospect of so doing, then the criteria for exemption under Article 85(3) have not been satisfied: no improvements in distribution or technological progress have been realised, consumers have not benefited from new product and increased choice. Article 9(3) hence permits the Commission to withdraw exemption where Article 85(3) has not been satisfied and there is no possibility of the failure being rectified by a switch of licensees. It follows that licensors would be prudent to include in the agreement a clause entitling them to terminate the licence at the end of five years and thereafter at yearly intervals if exploitation by the licensee is inadequate. To this end the parties will need to predetermine what they consider to be an "adequate" exploitation and they may wish to incorporate their conclusions in the licence itself.

(iv) Refusal by the licensee to meet unsolicited demands (passive competition)

Exemption may be withdrawn where, "without prejudice to Article 1(1)(6), the licensee refuses, without objectively valid reason, to meet unsolicited demand from users or resellers in the territory of other licensees." Article 1(1)(6) makes it clear that licensees may refuse to meet unsolicited demands from outside of their territory for a limited period of five years from first marketing within the EEC. Paragraph 12 of the preamble justifies Article 1(1)(6) on the basis that it enables the licensee to focus his efforts on his own territory in the security of absolute protection for a period of years from other licensees. By this "the number of production facilities and the quantity and quality of goods produced in the Common Market are increased." Thus, Article 1(1)(6) and paragraph 12 of the preamble constitute one 'objectively valid reason' for a refusal to meet unsolicited demands. In circumstances other than Article 1(1)(6) (e.g. after the five year period has elapsed) it will be rare for a refusal to be objectively justified. The Commission do not, as yet, accept that the "free-rider" problem is a proper justification for refusal to supply. This problem is discussed in Chapter 10 on distribution in connection with Regulation 83/83/EEC. Essentially, licensees may contend that they need protection from parallel importers who sell at prices lower than those of the authorised licensee. Such parallel importers can afford to charge low prices because they ~~need~~ not provide comprehensive promotion and pre-sales services such as are provided by the licensee. Indeed, so the argument runs, parallel importers rely upon customers being able to exploit the licensee's services (displays, testing facilities, advice of sales staff etc.) but make the actual purchase from the parallel importer. Thus the parallel importer "free rides" on the sales services provided by the licensee. Ultimately the licensee may have to reduce the sales services he provides in order to bring his prices into line with those of the parallel importer thereby threatening the licensors reputation which may be present in the form of a trade mark or other designation on the product. The Commission, whilst accepting that free-riding is a problem, do not consider that it is so prevalent as to justify measures to prevent parallel imports which are perceived as healthy forms of competition.

(v) Parties create obstacles to parallel imports

Exemption may be withdrawn where one or both of the parties seeks to create obstacles to parallel imports. The wording of Article 9(5) which is to this effect is the same, *mutatis mutandis*, as Article 3(11) which is discussed above. Reference may be made thereto for analysis. Article 9(5) is in reality somewhat superfluous given that, under Article 3(11), any agreement which seeks to hinder parallel imports is automatically outside the scope of the bloc-exemption. Thus, the Commission should never have to rely on Article 9(5) to withdraw exemption since such an agreement should not enjoy exemption in the first place.

VIII. Meaning of "Connected Undertakings": Articles 11(3) and 12

Article 11(3) states that the Regulation shall apply to patent licensing agreements in which rights or obligations of the licensor or the licensee are assumed by undertakings connected with them. Article 12 defines a "connected undertaking". The definition is exactly the same as that used in the bloc-exemption on exclusive dealing Regulation 83/83/EEC. This is discussed in Chapter 10 Section C to which reference may be made. In essence a connected undertaking is one in which a party to the agreement directly or indirectly exercises effective control (i.e. *de jure* or *de facto* control). Furthermore, it includes parents and subsidiaries of such connected undertakings.

IX. Transitional Periods and Currency of Bloc-Exemption: Articles, 6, 7, 8 and 14

Articles 6-8 cover: agreements already in force at the time the Regulation became operative; "old agreements"; and accession agreements. Article 13 concerns the duration of the Regulation itself. Paragraph 26 of the preamble reads: "The Regulation should apply with retroactive effect to patent licensing agreements in existence when the Regulation comes into force where such agreements already fulfil the conditions for application of the Regulation or are modified to do so (Articles 6 to 8). Under Article 4(3) of Regulation No. 19/65/EEC, the benefit of these provisions may not be claimed in actions pending at the date of entry into force of this Regulation, nor may it be relied on as grounds for claims for damages against third parties."

(i) Existing agreements, retroactivity

For two very specific categories of agreement exemption under the Regulation applies retroactively from the time at which the conditions

for application of the Regulation were fulfilled. These two types of agreements are: (a) agreements existing on 13 March 1962 and notified before 1 February 1963. This group of agreement will be very small in number due to the obvious historical nature of the category; (b) agreements (whether notified or not) to which Article 4(2)(2)(b) of Regulation 17/62/EEC applies. This provision exempts from the need to notify bilateral agreements which only, "impose restrictions on the exercise of the rights of the assignee or user of industrial property rights - in particular patents, utility models, designs or trade marks - or of the person entitled under a contract to the assignment, or grant, of the right to use a method of manufacture or knowledge relating to the use and to the application of industrial processes."

As regards all other agreements notified before the Regulation came into force the exemption applies retroactively from the time at which the conditions for application of this Regulation were fulfilled, or from the date of notification, whichever is the later. Thus many of the two thousand agreements notified to the Commission and pending a Commission response prior to the Regulation will become exempt on its enactment.⁸⁸

(ii) "Old Agreements"

An "old agreement" is one existing on 13 March 1962 (the date when Regulation 17/62/EEC - the main legislative instrument of competition procedure came into force) and notified to the Commission prior to 1 February 1963 (the period of grace provided for notification by the Council in Regulation 17/62/EEC as amended). For "old" agreements and agreements to which Article 4(2)(2)(b) of Regulation 17/62/EEC applies (see above) which were notified before 1 January 1967, the rules are quite generous. Where such agreements were amended so as to comply with the Regulation before 1 April 1985 and these amendments were communicated to the Commission before 1 July 1985 the **prohibition** in Article 85(1) is inapplicable in respect of the period prior to the amendment. The **notification** takes effect from the time of its receipt by the Commission. Where the **notification** was sent by registered post it becomes effective from the date shown on the postmark of the place of posting.

(iii) Accession agreements

As regards agreements caught by Article 85 as a result of the accession of the UK, Ireland and Denmark, Articles 6 and 7 apply except that the relevant dates are: 1 January 1973 instead of 13 March 1962;

and, 1 July 1973 instead of 1 February 1963 and 1 January 1967.

Where Greece is concerned the date changes are: 1 January 1981 instead of 13 March 1962; and, 1 July 1981 instead of 1 February 1963 and 1 January 1963.

(iv) Duration of the Regulation

The Regulation becomes operative on 1 January 1985 and applies until 31 December 1994 i.e. ten years.

X. Confidentiality on the Part of the Commission: Article 13

Information received by the Commission under the opposition procedure may only be used for the purposes of the Regulation i.e. deciding whether exemption lies or not. The Commission and national authorities (who **are** involved in the opposition procedure) are prohibited from disclosing information acquired by them under the Regulation of the kind covered by the duty to maintain professional secrecy. Almost certainly unauthorised disclosure by the Commission would render the latter subject to a claim for damages before the European Court under Article 215(2) EEC (liability of the Community for non-contractual liability).⁸⁹ It is most unlikely that authorities in the Member States could be liable under Article 215 EEC unless they were viewed as agents of the Commission. More likely they **might** be liable for damages before the national courts on the basis of breach of a directly applicable regulation. For details of such actions in the UK Courts see Chapter 7 Section D (Enforcement in national Courts).

It should be appreciated, as a proviso to the above, that the authorities are not prevented from publishing general information or surveys which make use of such information but which do not contain information relating to particular undertakings or associations of undertakings i.e. the authorities may use the data collected in a general way.

XI. Checklist for Determining whether the Exemption Applies

The checklist below is an overview only, it is not a substitute for proper analysis of the text of the Regulation itself.

Condition 1: Agreement must be of a type described in Article 1 of the (agreements Regulation. Account should be taken of Articles 10 and 11 which exempt) extend the Regulation to agreements that are effectively the same as the patent licence described in Article 1. The Regulation covers agreements involving undertakings "connected" to the parties to the licence (Article 12). The Regulation

does not apply to: patent pools; licences derived from some joint ventures; reciprocal licences; and, plant breeders rights (Article 5).

Condition 2: The agreement may legitimately contain clauses listed in Article 2. These are, in summary, clauses: granting exclusivity (white to the licensee; obliging the licensor not to compete with the licensee; protecting licensees from competition from each clauses) other; obliging the licensee to use the licensor's trade mark.

Condition 3: Agreements containing clauses listed in Article 2 cause no problem. These clauses do not generally restrict competition, (white where they do Article 2 extends the exemption to them. The clauses) permissible clauses may concern the following:

- purchase or procurement;
- minimum royalties, production quality or number of operations;
- restrictions on technical use;
- expiry of the agreement;
- prohibition on sub-licensing or assignment;
- identification of patentee on licensed products;
- non-disclosure of know-how;
- infringement clauses (excluding no challenge clauses);
- minimum quality;
- improvement and communication of experiences (Grant/licence back);
- most favoured licensee's terms.

Condition 4: Under no circumstances can bloc-exemption be claimed for (black licenses containing clauses outlined in Article 3. The clauses) "black" unacceptable clauses may concern the following:

- no challenge clauses;
- extension of the agreement beyond expiry of patent;
- excessive non-competition clauses;
- royalty payments in respect of unprotected rights;
- limitations on quantity or number of operations;
- prices and discounts;
- customer control restrictions
- assignment back of improvement patents;
- excessive tying clauses (packaging licensing of patents)
- prohibitions on passive sales;
- creation of obstacles to parallel imports.

Condition 5: Agreements of a type generally caught by the Regulation (extension of (Condition 1 above) which contain clauses which are not exemption by expressly permitted by Articles 1 and 2 but which, conversely, **opposition** are not expressly prohibited by Article 3 may obtain automatic procedure) exemption by use of the opposition procedure in Article 4.

Condition 6: In exceptional cases the Commission might, by formal decision, (withdrawal of exemption) withdraw exemption from an agreement. The Commission might issue such decisions in the following cases, amongst others:

- where arbitration awards result in restrictive settlements;
- where inter brand competition is ineffective;
- where the licensee fails to effectively exploit the licence and no termination rights belong to the licensor;
- where licensee refuses to meet unsolicited demands;
- where parties create obstacles to parallel imports.

D. PATENT LICENSING UN UNITED KINGDOM LAW

Patent licences are not regulated in the UK to the extent that they are in EEC law. Prima facie licences are exempt from the RTPA 1976. They are however subject to the CA 1980 though there is no case expressly on point to date.⁹⁰

I. Under the RTPA 1976

Schedule 3(5) RTPA 1976 exempts from application of the Act licences and other disposals of patents and registered designs. For details see Chapter 2 Section L. Patent pools however are not exempt from registration.

Regardless of Schedule 3(5) RTPA 1976 it is generally accepted that licences of proprietary rights are not registrable. First, the licensing of a proprietary interest does not amount to a supply of services or goods for the purposes of the RTPA 1976.⁹¹ Secondly, a licence imposing limitations on the licensee is not legally to be counted as restrictive. The licensee has no inherent right to utilise the proprietary rights and hence a licence, albeit one limited in scope, constitutes a grant of rights and not a restriction on existing rights.⁹²

A licence is not registrable if only one party accepts relevant restrictions. Thus if only the licensee is subject to restrictions

the agreement need not be registered. When considering registrability no account is to be taken of any term which relates exclusively to the goods or services concerned.⁹³

II. Under the Competition Act 1980

(i) Legal context

The terms of licensing agreements not subject to the RTPA 1976 are subject to the Competition Act 1980 (CA 1980). To date the OFT and MMC have dealt with copyright questions but not directly with other forms of intellectual property. The principal issue in these cases has been whether the refusal to grant a licence has been anti-competitive. In respect of patents, refusal to license is expressly covered, not by the CA 1980, but by Section 48 of the Patents Act 1977 which makes provision for compulsory licences. This is examined below. As regards tying clauses in patents these also are covered by the Patents Act 1977 and are discussed below.

As regards other clauses in licences there is scant guidance to assist in predicting the likely attitude of the OFT or MMC. However, the MMC has stated in respect of proceedings under the CA 1980 that where there is relevant EEC law on a point this will be relevant in its reckoning.⁹⁴ Hence it may be useful to refer to Regulation 2349/84/EEC (discussed above) on bloc-exemption for patent licensing as an indicator of how the MMC may approach specific clauses.

The power to investigate terms and conditions, for example tying, in patent licences is unaffected by the provisions of the Patent Act discussed below.⁹⁵

(ii) Follow-up action after an adverse Report by the MMC

Where the MMC conclude adversely that a course of conduct by a patentee is anti-competitive and against the public interest then the powers in Section 51 Patents Act 1977 may be exercised. Under Section 51(2A)⁹⁶ of the Act the appropriate Minister may apply to the Comptroller General of Patents, Designs and Trade Marks for relief. The Comptroller may give relief where he is satisfied that the public interest is being harmed by one or more of three things:⁹⁷

- (a) any conditions in a licence or licences granted under any patent by its proprietor restricting the use of the invention concerned by the licensee; and
- (b) any conditions in a licence or licences granted under the patent by its proprietor restricting the right of the proprietor to grant other licences under the patent; or
- (c) a refusal by the proprietor to grant licences under the patent on reasonable terms.

The curative action that the Comptroller may take will consist of the exercise of one or more of three options:

- (a) cancellation of any condition(s) in the licence;
- (b) modification of any condition(s) in the licence; and,
- (c) the entering into the register of patents⁹⁸ that licences under the patent are to be available as of right.

Under Section 51(3) Patents Act 1977 before an application to the Comptroller the relevant Minister **must** publish a notice describing the nature of the proposed application and the Minister must consider any representation which is made to him within thirty days of the notice by persons whose interests may be affected by the proposed application. Parties may use this as an opportunity to persuade the Minister as to the appropriate course of action to be taken. The Minister, though bound to consider representations, is not bound to concur with them.

(iii) General attitude of the MMC

The MMC in general investigations under the FTA 1973 have considered patents on a number of occasions.⁹⁹ Their analysis has generally been somewhat superficial though a number of policy indications may be tentatively drawn from their reports which may be relevant under the CA 1980 or the Patents Act 1977. In Colour Film¹⁰⁰ the MMC indicated that control over patents may have no significant competitive consequences where competitors were also successful in producing comparable products. Thus, the level of inter brand competition is pertinent. Where rivals are producing effective substitutes there may be a case for arguing the de minimis defence i.e. restrictive effects not significant. In Flat Glass¹⁰¹ the dominant concern licensed its patents selectively (albeit quite generously) and required licensees to grant non-exclusive improvement licences to it; the patentee also granted non-exclusive royalty free improvement licences to licensees. The MMC did not criticise the selective patenting, indeed they praised the dominant concern for its

inventiveness. One of the most express statements by the MMC is found in Reprographic Equipment.¹⁰² Rank Xerox owned, by 1975, in excess of 2,250 patents. There was evidence that the company took out patents designed to extend the scope of existing patents and also took out patents that were open to the objection that they were obvious and trivial. The MMC stated:

"A large portfolio of patents impedes and delays the emergence of competition. The mere cost of technical examination of a large portfolio of patents is intimidating. As the Committee of Experts on Restrictive Business Practices of the OECD said in 1972 in their report on Restrictive Business Practices Relating to Patents and Licences: 'A large company, or particularly a combination of large companies, holding hundreds or thousands of patents relating to important technology may be able to exercise dominance in an industry and subject it to excessive conditions or royalties. The tremendous number of patents held by large companies may in itself, prevent a testing of their validity in the courts'."¹⁰³

In this context failure to license the patents had anti-competitive effects. Competitors experienced considerable difficulties in developing substitutes and this hindered their expansion.

(iv) Compulsory licensing under Section 48 of the Patents Act 1977

The Comptroller General of Patents, Designs and Trade Marks has power to grant compulsory licences at the end of three years after a British patent has been granted.¹⁰⁴ The Comptroller may settle the terms of the licence as he sees fit¹⁰⁵ and this may include a compulsory licence that is exclusive of the patentee and which revokes other licences.¹⁰⁶ Compulsory licences are rarely applied for and granted. This is ascribed to the fact that they are granted only at the discretion of the Comptroller and, more pertinently, that there is no **principle** that once one of the grounds for compulsory licensing laid out in Section 48(3) is made out there arises a general expectation that the application will be granted unless exceptional circumstances also exist.¹⁰⁷ There are five grounds in Section 48(3)(a)-(e) which may justify the granting of compulsory licenses. These are as follows:

(a) "Where the patented invention is capable of being commercially worked in the United Kingdom, that it is not being so worked or is not being so worked to the fullest extent that is reasonably practicable."

The provision may be pleaded where the patent has been exploited outside of the UK but not in the UK with UK demand being met by

imports. However, if a compulsory licence were issued as a measure to countermand imports this *might* be in contravention of Article 30 EEC as a measure of equivalent effect to a quantitative restriction, i.e. a hindrance to imports.¹⁰⁸ Though, this view was rejected by the High Court in Extrude Home Corp.'s Patent.¹⁰⁹ The point has not been tested before the European Court. Presumably once the Community Patent Convention¹¹⁰ comes into force exploitation anywhere in the Community will be an adequate discharge of the duty on the patentee to properly exploit his rights.

The Courts have rejected arguments under this provision based upon the restraining of output by the patentee as a means of maximising monopoly profits. They have declined to examine whether lower prices would stimulate demand.¹¹¹ Though the Courts will apparently take account of arguments that demand levels remain unsatisfied at the prevailing price.¹¹²

- (b) "Where the patented invention is a product, that a demand for the product in the United Kingdom - (i) is not being met on reasonable terms, or (ii) is being met to a substantial extent by importation."

The caveat noted above in (a) that compulsory licences designed to countermand imports from the EEC may infringe Article 30 applies here in respect of the second ground.¹¹³ It is pertinent to note that Article 30 EEC is directly effective and breach of it by the Government, through the agency of the Comptroller, could result in a damages claim by, for instance, foreign licensee suppliers of the patented product to the UK. With respect to the first ground it would appear that compulsory licences may be granted where the patented products are supplied in the ~~UK at~~ price levels which are a burden to the consumer and are unreasonable.¹¹⁴

- (c) "Where the patented invention is capable of being commercially worked in the United Kingdom, that it is being prevented or hindered from being so worked - (i) where the invention is a product, by the importation of the product; (ii) where the invention is a process, by the importation of a product obtained directly by means of the process or to which the process has been applied."

The caveat concerning Article 30 noted above applies here as does the view of the English Courts, untested before the European Court, that Article 30 is not a problem.

- (d) "That by reason of the refusal of the proprietor to grant a licence or licences on reasonable terms - (i) a market for the export of any patented product made in the United Kingdom is not being supplied, or (ii) the working or efficient working in the United Kingdom of any other patented invention which makes a substantial contribution to the art is prevented or hindered, or (iii) the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced."

This ground is based upon the public interest need to ensure the adequate exploitation of patents. Thus, if a patentee refuses to licence a master patent to another who holds a derivative patent for an improvement then the refusal has hindered the working of another patent under Section 48(3)(d)(ii). This provision is subject to Section 48(7) whereby any compulsory licensee must be prepared to cross-license his own patent on reasonable terms. One relevant question is what is meant by "reasonable terms". The Courts have taken the view that the patentee enjoys considerable freedom as to choice of price or royalty and this freedom is only substantively curtailed by the limit of the licensees willingness to pay.¹¹⁵

- (e) "That by reason of conditions imposed by the proprietor of the patent on the grant of licences under the patent, or on the disposal of use of the patented product or on the use of the patented process, the manufacture, use or disposal of materials not protected by the patent, or the establishment or development of commercial or industrial activities in the United Kingdom, is unfairly prejudiced."

The essence of this provision is the unfairness ground i.e. the restrictions imposed on the licensee must unfairly prejudice the ability of the licensee to exploit the patent. In common with other grounds in Section 48(3) attempts by the patentee to wring excessive profits from the licensee do not appear to be "unfair".¹¹⁶

In addition to the grounds listed above in Section 48(3)(d) the Comptroller, in deciding whether or not to grant a compulsory license, must bear in mind overriding factors:¹¹⁷ First, to ensure full exploitation rapidly; secondly, to ensure that the patentee receives reasonable remuneration from the patent; and thirdly, to ensure that anyone working or developing an invention in the UK is protected from unfair prejudice. These factors are to be assessed as at the time of

making the application.¹¹⁸ In addition to these three broad objectives the Comptroller will consider certain narrower objectives viz.,¹¹⁹ the nature of the invention, the time that has elapsed since grant of the patent; the extent to which the patentee or licensee has already exploited the invention; and the ability of the applicant to properly exploit the patent including any financial and operating risks to him.¹²⁰

(v) Compulsory licensing and the free movement of goods: Patentee's right to prevent imports

In Pharmon BV v. Hoechst AG¹²¹ the European Court stated that the exhaustion principle did not apply to a compulsory licence. It held the patent in Germany for a process for the manufacture of the drug furosemidum. Parallel patents were held in the UK and Holland. In 1972 DDSA obtained a compulsory licence in the UK for production of furosemidum valid only in the UK and subject to an export prohibition.¹²² In breach of this condition DDSA exported the drug to Holland where H commenced infringement proceedings against DDSA. The European Court first reaffirmed that Articles 30-36 EEC prohibit the application of national legislation which grants a patent holder the power to prevent the importation and distribution of a product which has lawfully been placed on the market of another Member State by the patent holder himself with his consent or by a person with whom he has close legal or economic links. However, the Court held that the same rule did not apply when the importation and marketing related to a product which had been manufactured in the exporting Member State by the holder of a compulsory licence under a parallel patent held by the holder of a patent in the importing Member State. The explanation being that when a Member State grants a compulsory licence the patentee can not be deemed to have consented to the acts carried out by the compulsory licensee.¹²³ Thus H was entitled to succeed against DDSA. The terms and conditions in the compulsory licence were irrelevant to this decision, hence the fact that the compulsory licensee breached the terms of the compulsory licence was not relevant.

(vi) Tying clauses in Patent licenses: Section 33 Patents Act 1977

Under Section 44 Patents Act 1977 certain clauses in contracts for the supply of patented products; licenses to work a patent; or contracts relating to any such supply or license, are void.¹²⁴ The prohibited clauses are as follows:

- (a) clause requiring the purchaser or licensee to purchase or acquire from the supplier, patentee or nominee or either, "anything other than the product which is the patented invention" i.e. a secondary product.
- (b) clauses prohibiting the purchaser or licensee from taking competing technology whether in the form of patented or unpatented articles or processes.

Whilst a prohibited term remains in the agreement it constitutes a defence to any proceedings for infringement commenced by the patentee.¹²⁵ The Act does not provide an exemption for technically necessary ties though there is such an exemption in the EEC bloc-exemption¹²⁶ so that a licence complying with the EEC Regulation should by virtue of the exemption contained therein be safe from Section 44 in so far as that provision conflicts with the Regulation. Such a conflict might arise where a licence between a licensor and licensee both situate in the UK and which has potential to affect inter state trade contains a tie void under the Patents Act but exempt under the Regulation. There is, however, an exemption under the Patents Act where the patentee is willing to supply the patented product or grant a licence without the tie clause on reasonable terms. Furthermore, the purchaser or licensee must be entitled under the contract or license to escape the tie by giving three months' notice in writing though such a party must also be prepared to pay compensation to the supplier/patentee. "Compensation" means, in the case of a contract to supply, a lump sum or rent for the residue of the term of the contract, and, in the case of a licence, a royalty for the residue of the licence. The actual sum is determined by an arbitrator appointed by the Secretary of State.¹²⁷

Section 44 applies in a formalistic manner; only contracts or licences incorporating formal ties or prohibitions are void. Hence where the tie or prohibition is informal the clause is valid. Thus inducements and incentives may be used as substitutes for formal clauses. For example, a licence whereby the licensee accepts an inducement (e.g. a reduction in royalty obligations, or, automatic grant of royalty free improvement patents taken out by the patentee) not to take alternative supplies from a competitor of the patentee is not within Section 44.¹²⁸ Likewise, a clause whereby the licensee is given an inducement to take an additional product or service from the patentee should also be outside of Section 44.

E. COPYRIGHT LICENSING IN EEC LAW

I. Legal context

The Commission considers that the principles applicable to patent licensing are equally relevant to copyright licensing.¹²⁹ Hence Regulation 2349/84/EEC may be a useful guide to the policy of the Commission towards different clause types. In particular the list of "black" unacceptable clauses in Article 3 should be taken note of. In most cases the list of obligations which are stated *prima facie* to fall outside of Article 85(1) will apply also to copyright. However, simply because the patent Regulation may be used as a guide does not mean that copyright licences complying with it are exempt from notification to the Commission.

II. Exclusive licences: Open and Closed Licences

The principles in Nungesser v. Commission¹³⁰ discussed in Section B II are relevant here. Indeed the Commission has informally applied the principle that certain types of open exclusive licence are not within Article 85(1) to copyright. In Nungesser, it will be recalled, the Court intimated that open exclusive licences are outside of Article 85(1) where they involve new products created through substantial R & D where exclusivity is needed to facilitate market penetration. In Knoll-Hille Form¹³¹ the licensor granted various intellectual property rights, and in particular copyright, to a licensee. The licence prohibited the licensor from granting further licences in the licensee's territory and from exploiting its rights there (exclusivity and non-competition clause). The licensee was prohibited from selling outside of its territory. Both licensor and licensee held significant market positions. The Commission doubted whether the Nungesser case applied: "Neither the newness of the products concerned nor the amount of investment involved seemed to indicate that the exclusivity granted was indispensable to launching the products in the relevant market, at any rate not for the length of time originally envisaged (eight years)."¹³² Thus the provisos that attach to the open exclusive licence exception are being applied by the Commission. The European Court has affirmed its approach to "open" licences in Coditel II¹³³ where they held that an exclusive copyright licence of a film was not necessarily caught by Article 85(1).¹³⁴

III. Other Clauses in Copyright Licences

That the Commission view copyright licences in much the same way as they do patent licences is apparent from Neilson - Hordell/Richmark.¹³⁵ The Commission intervened following a complaint by a licensee against certain clauses included in a settlement terminating earlier copyright infringement proceedings. In question were four clauses: no-challenge clause; non-competition clause; clause requiring the payment of royalties on unprotected products; and, a clause requiring the licensee to transfer the title of any copyright in any improvement made to the licensed product to the licensor. In the light of Commission opposition the parties voluntarily deleted all the above clauses. The Commission stated that usually such clauses were prohibited by Article 85(1) and inappropriate for exemption under Article 85(3). The fact that the clauses formed part of a settlement agreement terminating earlier proceedings was immaterial.

Where the copyright holder enjoys a dominant position terms in a licence which are unfair and exploitative may constitute an infringement of Article 86 EEC. However, simply because a firm owns intellectual property does not necessarily mean that it holds a dominant position;¹³⁶ the level of competition from substitute products must be considered. For a dominant concern to tie products together will, in the absence of a technical justification, almost certainly amount to a breach of Article 86. Thus, the Commission considered that the practice of IBM - who was alleged to be dominant in a part of the computer market - in "bundling", first, the price of main memory with that of central processing units, and secondly, the price of operating systems with that of central processing units, was an infringement of Article 86 EEC.¹³⁷

IV. Protecting Exclusive Territories: Free Movement of Goods and Services

The principles concerning free movement of goods and the exhaustion principle apply to copyright as well as to patents. See Section B III for an overview of the question. Thus in Membran and K-tel International v. GEMA¹³⁸ the Court emphasised that sound recordings even where incorporating protected musical words are products subject to the rules on the free movement of goods. Thus the owner of an exclusive right to produce records under national law cannot use that law to prevent the importation of records which had been lawfully marketed in another Member State by the owner himself or with his consent. An exception to the general rule on exhaustion is the performance field as regards retransmission by cable television.¹³⁹

V. Compulsory Licensing

In the IBM Settlement Case,¹⁴⁰ following protracted negotiations between IBM and the Commission, the former agreed to make available certain proprietary information concerning the interfaces between its computers and plug compatible machines and those of competitors. The basis of the settlement between IBM and the Commission was Article 86 EEC. The Commission considered that the refusal to disclose the relevant data, which was needed by competitors to ensure that their machines were efficiently plug compatible with IBM's, was designed to enhance IBM's alleged world dominance over the main-frame computer market. Without a formal decision being taken, nor IBM having admitted either dominance or abuse, the company agreed to license competitors with relevant data. Whilst neither party relied upon issues of intellectual property the data in question related to copyrighted designs and hence the case is a signal indicator of Commission policy.¹⁴¹ Where a holder of copyright enjoys a dominant position and refusal to license creates entry and expansion barriers to rivals then such refusal may constitute a breach of Article 86 EEC. The same may apply to the inadequate licensing of the proprietary right. For a copyright holder to be dominant there would have to be an absence of substitutes or alternatives to the copyrighted product (i.e. lack of inter-brand competition). See Chapter 9 Section G for further details.

Doubt must exist over the legal competence of the Commission to enforce compulsory licences in view of the Berne Convention of 1886 as amended. See the discussion of this in respect of UK law below (Section F II(iv)).

F. COPYRIGHT LICENSING IN UNITED KINGDOM LAW

I. Under the RTPA 1976

Prima facie copyright licences are exempt from registration under the RTPA 1976 by virtue of Schedule 3(5A) of the Act. This is discussed in Chapter 2 Section L and reference thereto should be made for discussion. However, restrictions may become registrable if they extend beyond the currency of the legal protection granted the copyright. Agreements that do become registrable are generally suitable for Section 21(2) treatment though account may be taken of the degree of market power enjoyed by the copyright holder when assessing the economic effect of any restrictions.¹⁴² See the expression of policy of the OFT in the Ford Motor Company case below.

II. Under the Competition Act 1980

Copyright licensing is subject to the CA 1980. In particular refusals to license copyright have proven a major issue. As regards terms and conditions in licences these will be subject to the Act and some guidance as to what may be considered anti-competitive may be found in the discussion above concerning EEC law which itself refers to the bloc-exemption on patent licensing for guidance.

(i) Refusal to license: when anti-competitive

In two cases both resulting in references to the MMC the OFT have considered the question of refusal to licence. In both cases they have enunciated the principle that a refusal to licence, though perfectly legal, may nonetheless be anti-competitive under the CA 1980 when the copyright holder is not subject to effective inter-brand competition.

In Ford Motor Company¹⁴³ (licensing for the manufacture or sale of replacement body parts) the OFT stated:

"Copyright confers on one person (the owner of the right) the exclusive right to control the supply of a particular good (a good made to the registered design of the owner or copied from work in respect of which he owns the artistic copyright) and to prevent all unauthorised persons from supplying that particular good to the market. To the extent that this right is exercised competition in the supply of the good in question is restricted. Prevention of other persons from supplying a particular good is, however, unlikely to amount to an anti-competitive practice in markets where there are substitutes for the good or where substitutes may be freely developed by others.

The effects on competition arising from the exercise of copyright therefore depend on the market in which the particular good is supplied. Where there are reasonable substitutes for the particular good or alternative designs or developments can be made, the exclusive rights of supply do not confer monopoly rights in the market and the exercise of copyright is unlikely to have an anti-competitive effect."¹⁴⁴

Thus the level of inter-brand competition is a central factor. The actual level will be determined by considering the extent to which substitutes are available for the copyright product. Thus, for example, where the product is replacement body parts for Ford vehicles there will be no substitutes by the very nature of the product.¹⁴⁵ Conversely, where the product is a recording of a Beethoven symphony the fact that there may be a dozen or more competing recordings made in the past few

years denies the copyright holder any degree of market power. Likewise, the author and copyright holder of a reference book on Competition law is subject to competition from other authors and copyright holders of reference books on Competition law.

(ii) Refusal to license and excessive royalty payments

A copyright holder might in principle agree to grant licences but in practice refuse unless the licensee agrees to pay an exorbitant royalty fee. The (intended) effect of this policy may be to discourage prospective licensees. In effect this policy is indistinguishable from one of blanket refusal to license. In Ford Motor Company the OFT stated: "A refusal by Ford to license unless a royalty fee is paid, appropriate to the circumstances of the case, would not constitute conduct which was restricting or likely to have the effect of restricting or preventing competition."¹⁴⁶ They continued to suggest that a royalty fee would be anti-competitive if it were set at a level such that no competitor would be prepared to enter the market. The OFT did not set down appropriate levels though they did note that British Leyland demanded a fee of 7% of selling price of copyrighted products.¹⁴⁷ Where patents were concerned the OFT accepted that royalty payments vary considerably but stated that rates between 20-25% of gross sales price were usual where R & D costs were high and rates of approximately 10% were normal where R & D costs were lower. Obviously it is open to holders of intellectual property rights to plead unusually high R & D costs justifying higher than normal royalty fees. However, the opinion of the OFT is that demands in excess of the figures given above may be anti-competitive. The view of the MMC is generally in line with that of the OFT. Interestingly the MMC have accepted the "free-rider" argument that unless a licensee pays a royalty fee which realistically reflects the R & D costs of the licensor then the licensee may "free-ride" on the R & D efforts of the licensor with whom he is in competition.¹⁴⁸ Furthermore, the MMC accept that, "there is a public interest in the provision of an adequate reward for innovation throughout industry."¹⁴⁹ A proper royalty fee would respect this principle, enable the licensor to recover its R & D costs yet not be such as to create an entry barrier to rival suppliers.

In BBC and ITV¹⁵⁰ (publication of programme information) the OFT investigated the refusal by BBC and ITV to grant licences concerning copyrighted information relating to programme schedules to other potential suppliers of such information (magazines, journals etc.). By refusing to

license, BBC and ITV sought to protect their respective markets for the "Radio Times" and the "TV Times". When considering appropriate royalty fees both companies indicated that royalties should be such as to compensate for any loss of profits that would result from compulsory licenses.¹⁵¹ The OFT rejected this view that royalty payments should be connected to profit margins and reaffirmed the position adopted in Ford Motor Company that royalty fees should bear a relation to production costs and should not be so high as to deter market entry by potential suppliers.¹⁵²

Finally, on this point it must be questioned whether a copyright holder could be forced to grant licences on a purely cost basis. Copyright is property¹⁵³ and a vendor of property (for example a house) may sell that property at the prevailing market value which will invariably exceed basic cost. Why should a copyright holder not likewise be entitled to earn a reasonable profit on the licence? Indeed, one may go further and argue that a compulsory licence including a royalty based purely upon cost would be an invasion of the holder's proprietary rights made without adequate compensation. A statute may not deprive a property owner of vested rights without giving compensation unless such an intention to deprive is expressed in the statute in "clear and unambiguous terms".¹⁵⁴ The right to compensation for deprivation of a private property right has been described as a "fundamental principle of English administrative law".¹⁵⁵ Compensation means, in this context, the "cash" value or "fair market" value.¹⁵⁶ The MMC in the Ford Motor Company case did seemingly accept that a royalty must provide an "adequate reward for innovation". The concept of "reward" should be taken to imply a level above cost.

(iii) Remedies available following an adverse MMC Report

Following an adverse MMC Report the Secretary of State may exercise any of the powers laid down in Part 1 of Schedule 8 of the FTA 1973.¹⁵⁷ Alternatively or additionally he may, "Prohibit a person named in the order from engaging in any anti-competitive practice which was specified in the report or from pursuing any other course of conduct which is similar in form and effect to that practice".¹⁵⁸ For details of the powers in Part 1 of Schedule 8 FTA 1973 see Chapter 3 Section E VII.

It is now accepted that in the case of copyright none of these powers are appropriate to enable the Secretary of State to make an order compelling a copyright holder to grant licences.¹⁵⁹ In Ford Motor Company

the MMC stated:

"The anti-competitive practice found in this case by OFT and specified in this report is that of 'not granting to any person ... a license to manufacture or sell in the United Kingdom any replacement body part'. An order prohibiting Ford from engaging in this practice might appear to oblige Ford indirectly to grant licenses; but it would not specify the royalty to be charged

It might be permissible for the Secretary of State (though one expresses no opinion on this), relying on the reference in Section 10(2) to 'any other course of conduct which is similar in form and effect', to prohibit Ford from pursuing the course of refusing to grant a license to any person at a reasonable rate of royalty. Even if this could be done, the difficulty would remain of establishing a reasonable rate and, again, in this case there would be no obligation upon Ford to accept arbitration."¹⁶⁰

There must exist considerable doubt as to the capacity of the Secretary of State to make an order compelling compulsory licences. Any order made by the Secretary of State is subject to annulment in pursuance of a resolution of either House of Parliament.¹⁶¹ Though failure to annul does not affect the jurisdiction of the Court on an application for judicial review of the order.¹⁶² The conclusion of the MMC in the Ford Motor Company case was that some changes in the law on copyright were needed.¹⁶³

(iv) Whether Parliament has power under International law to provide for compulsory licensing of copyright

If the UK were to consider alterations to copyright law due account would have to be taken of the Berne Convention for the Protection of Literary and Artistic Works 1886 and also of the Brussels Revision of 1948 (coming into force 1951) and the Paris Revision 1971 (coming into force 1974).¹⁶⁴ The UK has to date not adhered to the Paris Revision though it may do so in the future. The Berne Convention is the oldest existent International treaty on copyright and is adhered to by more than seventy States, including all the EEC States.

Article 2(1) of the Convention defines "literary and artistic works". The definition embraces all literary productions whatever their form.¹⁶⁵ Article 7 of the Brussels Revision lays down that the term of the authors copyright for literary works shall be his lifetime plus fifty years after his death. No derogations from the author's right to prevent unauthorised copyings are allowed for. There are, however, two derogation provisions which provide for compulsory licensing for

broadcasting and public performance of literary and artistic works; and for recording of musical works (Article 11(2) and 13(2) respectively of the Brussels Revision). Both of these exceptions are relatively narrow. No other exceptions are provided for. The UK has not, at the time of writing, adhered to the Paris Revision though it is expected that this will occur in the foreseeable future. Adherence will entail various amendments to the Copyright Act 1956. One relevant provision of the Revision is Article 9(2). This reads:

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

Article 9(2) would permit of compulsory licences in respect of reproduction but only as provided in the Article. Hence, first, there must be a "special" case thus implying that no general right to enforce compulsory licences may be enacted into national law. Secondly, the reproduction must not conflict with normal exploitation of the work. Thirdly, reproduction must not unreasonably prejudice the legitimate interests of the author. The meanings of "normal exploitation" and "unreasonably prejudice the legitimate interests" are undefined. However, they appear to deny national law the right to enforce compulsory licences where such inhibits the inherent right of the holder to prevent unauthorised usage.¹⁶⁶ Though perhaps the concepts of normality and reasonableness may be assimilated with competition theory such that it is abnormal and unreasonable to refuse to grant licenses in an anti-competitive manner.

In summary, there would appear to be no existing power for compulsory licensing provisions to be enacted. When the UK adheres to the Paris Revision of the Berne Convention alterations will have to be made to the Copyright Act 1956. At that time Article 9(2) which allows for compulsory licensing in certain cases might be implemented though doubts as to the scope of this power exist.

G. TRADE MARK LICENSING IN EEC LAW

I. Legal Context

Trade mark licensing raises the same issues that are raised by patent and copyright licensing. The decision of the Commission in Campari¹⁶⁷ indicates that they will treat different clause types in trade mark licences in much the same way as clauses in patent licences. Hence reference to Regulation 2349/84/EEC concerning bloc-exemption for categories of patent licence¹⁶⁸ may be a useful guide to Commission thinking.

With respect to Regulation 2349/84/EEC trade mark licences incorporated into patent licences and ancillary to the grant of the patent may be exempted under that Regulation. Article 1(7) of the Regulation permits, "an obligation on the [patent] licensee to use only the licensor's trade mark or the get up determined by the licensor to distinguish the licensed product provided that the licensee is not prevented from identifying himself as the manufacturer of the licensed product." It should be stressed that the trade mark licence is ancillary to that of the patent licence and it may not be used to extend the effects of the patent licence beyond the life of the patents.¹⁶⁹

II. Exclusive Licences: Open and Closed Licences

It may be assumed that the principles derived from Nungesser v. Commission¹⁷⁰ apply equally to exclusive trade mark licences.¹⁷¹ For discussion see Sections B and E above.

III. Other Clauses in Trade Mark Licences

It was stated above that the treatment of trade mark licences may be expected to follow that of patent and copyright licensing. The decision of the Commission in Campari¹⁷² supports this view. In that case the Commission held that the following clauses fell outside of Article 85(1) or were exemptable under Article 85(3).

(i) Quality control measures

The licensor granted licences only in respect of certain of the licensees plants which were capable of guaranteeing the quality of the product. The restriction did not go beyond what was necessary for quality control. A clause permitting the licensor to veto any change in the place of manufacture in cases where the new establishment might adversely affect the product quality was also outside of Article 85(1) since "the

maintenance of quality is referable to the existence of the trademark right."¹⁷³ Analogous clauses in patent licences are stated to be outside of Article 85(1) by Article 2(9) of Regulation 2349/84/EEC.

(ii) Compliance with licensor's specifications

An obligation to follow the licensor's instructions relating to the manufacture of the product and the quality of the ingredients is not restrictive. Compliance is bound up with quality control and the same principles hence apply. The analogous provision in Regulation 2349/84/EEC is Article 2(9).

(iii) Exclusive purchase of certain products from licensor

An obligation to purchase certain secret raw materials from the licensor is another legitimate quality control measure and falls outside of Article 85(1). Article 2(1) of Regulation 2349/84/EEC states that, "an obligation on the licensee to procure goods or services from the licensor or from an undertaking designated by the licensor, in so far as such products or services are necessary for a technically satisfactory exploitation of the licensed invention", is *prima facie* outside of Article 85(1).

(iv) Confidentiality of know-how licensed with trade mark

An obligation prohibiting the licensee from divulging the manufacturing process to third parties does not infringe Article 85(1). Article 2(7) of Regulation 2349/84/EEC **covers** : "an obligation on the licensee not to divulge know-how communicated by the licensor; the licensee may be held to this obligation after the agreement has expired". Such an obligation *prima facie* falls outside Article 85(1).

(v) Prohibition on assignment

A clause prohibiting the licensee from assigning or sub-licensing the trade mark does not restrain competition. The licensor, by use of such a clause, merely safeguards its freedom to select its licensees. Article 2(5) of Regulation 2349/84/EEC provides that, "an obligation on the licensee not to grant sub-licenses or assign the license" is not *prima facie* a restriction.

(vi) Prohibition on exports outside of EEC

A ban on licensees supplying outside of the EEC does not infringe Article 85(1) where supplementary economic factors such as the accumulation of trade margins and of excise duties and taxes levied by importing countries as well as the duties charged on crossing the EEC borders,

render reimportation unlikely. It need not be proved that reimportation is impossible. This assessment applies also to States with which the EEC has entered into free trade agreements.¹⁷⁴

(vii) Promotional obligations

An obligation on the licensee to take measures for promoting the relevant product ~~does~~ not prima facie infringe competition. Thus clauses requiring licensees to maintain continuous contact with customers and to spend a standard minimum sum on advertising are not restrictive. An advertising restriction may be restrictive where the sum in question prevents the licensee from engaging in other activities or carrying on their own advertising.¹⁷⁵ An analogous provision is included in Article 2(3)(c) of the bloc-exemption on exclusive dealing.¹⁷⁶

(viii) Exclusive territories and ban on "active" exports

See the commentary concerning Nungesser v. Commission above relating to exclusive territories. Where such a clause does fall within Article 85(1) it may be exemptable under Article 85(3) provided the licensee is permitted to meet unsolicited orders from outside of his territory.¹⁷⁷ Analogous provisions are found in Article 1(4)-(6) of Regulation 2349/84/EEC on patent licensing, and, Article 2(2) of Regulation 83/83/EEC on exclusive dealing.

(ix) Ban on dealing in competing products. "No-dualling"

An obligation on the licensee not to carry products which compete with those licensed (i.e. a no-dualling clause) infringes Article 85(1) but may in exceptional cases be exempted under Article 85(1). Such a clause contributes to improving distribution of the licensed product by concentrating sales effort, encouraging the build up of stocks and shortening delivery times.¹⁷⁸ Analogous provisions may be found in Article 2(2)(a) of Regulation 83/83/EEC on exclusive dealing and Article 2(2) of Regulation 84/83/EEC on exclusive purchasing. However, no equivalent provision is to be found in Regulation 2349/84/EEC on patent licensing.¹⁷⁹ In Campari the Commission stated:

"The restriction on the licensees freedom to deal in other products at the same time as the products here in question prevents the licensees from neglecting Campari in the event of conflict between the promotion of Campari sales and possible interest in another product. Although a non-competition clause in a licensing agreement concerning industrial property rights based on the result of a creative activity, such as a patent, would constitute a barrier to

technical and economic progress by preventing the licensees from taking an interest in other techniques and products, this is not the case with the licensing agreements under consideration here. The aim pursued by the parties, as is clear from the agreements taken as a whole, is to decentralise manufacture within the EEC and to rationalise the distribution system linked to it, and thus to promote the sale of Campari-Milano's Bitter, manufactured from the same concentrates provided by Campari-Milano, according to the same mixing process and using the same ingredients, and bearing the same trademark as that of the licensor."¹⁸⁰

In view of the fact that "no-dualling" clauses are generally forbidden by the Commission in patent licenses and that this has been confirmed in the bloc-exemption, a degree of caution should be exercised in relying upon Campari as indicating permissiveness by the Commission to such clauses.

(x) No challenge clauses

An obligation on the licensee not to challenge the legal validity of the licensor's trademark is a serious infringement of Article 85(1) and is unsuitable for exemption.¹⁸¹ Article 3(1) Regulation 2349/84/EEC is to the same effect.

IV. Protecting Exclusive Territories: Free Movement of Goods and Services¹⁸²

Trade mark owners may not use infringement proceedings to enforce market division or exclusive territories. The European Court has thus established a doctrine of "common origin" i.e. two or more intellectual property owners may trace ownership of the right back, at an earlier date, to a single undertaking (the common origin). In Van Zuylen Freres v. Hag¹⁸³ the European Court held that trade marks had a natural propensity to result in market division because their duration was not limited. The Court continued that a trade mark owner was not entitled under Articles 30-36 EEC to rely upon the mark in order to prevent trade in goods lawfully produced and marketed in the territory of another Member State even though the trade marks are the same provided always that they share a common origin.¹⁸⁴ The doctrine of "common origin" has no application where domestic infringement proceedings are commenced to prevent imports from outside of the EEC, for example, from America.¹⁸⁵ Though, if X licenses Y a right to use X's trade mark in the USA and in Holland then the fact that Y has a lawful right to use the mark in the EEC presumably activates the "common origin" doctrine.

The "common origin" principle does not prevent proceedings for infringement against imports bearing similar marks which are owned elsewhere

in the community but which are not common in origin with the mark in question.¹⁸⁶ Though, the European Court has noted two limitations on this position. First, where the mark owner uses national proceedings in a selective, discriminatory manner then this might amount to arbitrary discrimination or a disguised restriction or trade under Article 36 EEC. Secondly, the infringement action must only be in respect of foreign marks which bear a close nexus to the mark sought to be protected. The decision of a domestic court on this nexus is apparently not determinative; the Commission and Court may take a different view.¹⁸⁷

H. TRADE MARK LICENSING IN UNITED KINGDOM LAW

I. Under the RTPA 1976

Trade mark licences are exempt from the RTPA by virtue of Schedule 3(4) RTPA 1976. This is examined in Chapter 2 Section K and reference thereto may be made for discussion. Even where a licence contains terms which are not expressly covered by Schedule 3(4) the RTPA 1976 does not apply provided the restriction concerns the actual trade mark. This extra exemption derives from case law and this is examined in Chapter 2 Section L. IV.

II. Under the Competition Act 1980

Terms in licences which have an anti-competitive effect may be subject to the CA 1980. As with patents and copyright (above) EEC law may be of some guidance value. Where compulsory licensing is concerned the same proviso made about the powers of the Secretary of State to issue an order compelling licensing of copyright may be made in respect of trade marks. See Section F II(iii) of this Chapter.

I. KNOW-HOW LICENSING IN EEC LAW

I. Legal Context

Know-how has been defined by the Commission as "a collection of industrial processes unprotected by the law on industrial property".¹⁸⁸ Given that know-how is unprotected by law many of the issues relating to patents, copyright and trade marks do not apply here. The Commission have held that an agreement whereby X grants to Y a non-exclusive right to use X's production

methods in exchange for royalties where the production methodology is new to Y is not within Article 85(1) where Y is not restricted as to territory.¹⁸⁹ In other respects the Commission are believed likely to take a strict approach to restrictive clauses in licences.¹⁹⁰

II. Know-how Communicated in Conjunction with a Patent Licence

Regulation 2349/84/EEC¹⁹¹ granting bloc-exemption to certain categories of patent licence extends to agreements which also contain provisions assigning or granting the right to use non-patented technical knowledge. Such agreements are commonly used to facilitate the transfer of complex technology containing both legally protected and unprotected elements. The exemption in the Regulation applies where the communicated know-how, "is secret and permits a better exploitation of the licensed patents".¹⁹² The exemption lapses when the last of the licensed patents expires. Precisely what is meant by "better exploitation" is uncertain. Probably it means that the know-how must enhance the attractiveness and demand for the patented product on the market. This it will do where it entails the supply of related and complementary goods or services which are important to commercial viability. The explanation for the required nexus between know-how and exploitation of the patent is that the Commission wish to ensure that a licensor does not claim rights over and demand royalties for know-how that is not useful.

The legal situation where the licensed product contains some patented and other unpatented elements is unclear. Where the know-how relates to unpatented elements then presumably exemption may not be claimed. More likely the know-how will relate to the whole product and hence to patented and unpatented elements. In such a case does the know-how still relate a better exploitation of the licensed patents? In the absence of Commission guidance no firm answer may be given. Until the position is clarified parties should either seek exemption from the Commission by notifying their agreements probably using the opposition procedure,¹⁹³ or, licence only that part of the product covered by the patent albeit that this may be proportionally less valuable when compared with the complete product.

III. Restrictions on use of Know-how by the Licensee under Regulation 2349/84/EEC

Can the licensor restrain the licensee from using the know-how following termination of the patent licence? In early drafts of the Regulation the Commission placed such an obligation in the "black" prohibited list. However,

it is not included in the final version though one might still expect a relatively unsympathetic attitude by the Commission.¹⁹⁴ A licensor wishing to include such a clause should notify probably by using the opposition procedure. In any event the licensor may not prevent the licensee from using the information once the know-how has entered the public domain i.e. is no longer secret. "Entering the public domain" is the equivalent of expiry of the intellectual property right. The Commission generally consider know-how to be public if it is accessible to the average expert. Where the licensee has deliberately or even negligently contributed to the know-how becoming public he will not thereby be released from restrictions on its use.

The licensor may require the licensee to continue with royalty payments for use of the know-how.¹⁹⁵ This applies even after termination of the patent licence or expiry of the patent provided such know-how has not entered the public domain. Such an obligation does not restrict the licensee's right to use the know-how even though the right is subject to royalty payments. Such an obligation is not within Article 85(1).¹⁹⁶

It follows from the above that royalties may not be required in respect of know-how that has entered the public domain. Such an obligation would place the licensee at a disadvantage when compared with unfettered competitors.¹⁹⁷ However such an obligation may be permitted where it is established that the obligations result from arrangements for spreading payments in respect of previous use of the licensed invention.¹⁹⁸ Where the formula for calculating royalties for use of know-how is complex and in assessing the correct fees the licensor might have access to the licensee's business secrets, the parties may be well advised to entrust the calculation of royalties to an independent third party e.g. an accountant.¹⁹⁹

As regards confidentiality Article 2(7) of Regulation 2349/84/EEC provides that, "an obligation on the licensee not to divulge know-how communicated by the licensor ..." is not *prima facie* within Article 85(1). The provision extends this to an obligation of confidentiality extending beyond expiry of the agreement.

IV. Know-How Licences to Sub-contractors

For details see Section K below.

J. KNOW-HOW LICENSING IN UNITED KINGDOM LAW

I. Under the RTPA 1976

Know-how licences are exempted from control by the RTPA 1976 by virtue of Schedule 3(3) and (8) RTPA 1976. These are discussed in detail in Chapter 2 Section J.

Know-how licences containing clauses unrelated to the know-how will require registration in usual fashion. Thus in Croda-Manox²⁰⁰ C and M entered a specialisation agreement under which they transferred capacity to each other in the fields of production that they were not specialising in. They also transferred know-how to each other in respect of that capacity. The agreement was given Section 21(2) dispensation.

II. Under the Competition Act 1980

There is no doubt but that the anti-competitive use of know-how is subject to the CA 1980. However, there are to date no cases on point.

III. Know-how Licences to Sub-contractors

For details see Section K below.

K. LICENSING INTELLECTUAL PROPERTY TO SUB-CONTRACTORS

In the conduct and performance of works by a contractor the hiring of independent sub-contractors is commonplace. Often the sub-contractor will employ technology protected by intellectual property rights of the contractor; licensing problems are hence raised.

I. EEC Law: The Sub-contracting Notice

The Commission have issued a Notice concerning its assessment of certain sub-contracting agreements in relation to Article 85(1)EEC.²⁰¹

"sub-contracting agreements" are defined as, "agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the sub-contractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf"

The Notice discusses a number of varieties of clause. These are described below. For discussion of other clause types see the discussion in the sections above.

(i) Limitations on use of technology by Sub-Contractor

Clauses whereby technology or equipment provided by the contractor may not be used for purposes other than the sub-contracting agreement and/or may not be made available to third parties do not fall within Article 85(1). The same applies to clauses requiring the sub-contractor to supply the goods, services or work resulting from use of the technology only to the contractor or on his behalf. Article 85(1) is not breached provided that the technology/equipment is necessary to enable the sub-contractor under reasonable conditions to operate in accordance with the contractors instructions. To this extent the sub-contractor is providing goods, services or work in respect of which he is not an independent supplier in the market. Such may be assumed to be **the case** where performance of the sub-contracting agreement makes necessary the use of rights, technologies and equipment belonging to the contractor and which permit the manufacture of goods which differ in form, function or composition from competing goods. For example:

- (a) intellectual property rights owned by the contractor or at his disposal e.g. patents, utility models, copyrighted designs, registered designs;
- (b) know-how of the contractor or at his disposal;
- (c) studies, plans or documents accompanying the information given which have been prepared by or for the contractor; or,
- (d) dies, patterns or tools and accessory equipment that are distinctively the contractors.

The Notice states that Article 85(1) is breached where the restrictions noted above are imposed on a sub-contractor who has independent capacity to provide the sub-contracted goods or services. In such cases the restrictions could deprive the sub-contractor of the possibility of developing his own business in the fields covered by the agreement.²⁰³

(ii) Other permissible clauses²⁰⁴

Article 85(1) is not infringed in respect of the following clauses:

- (a) Confidentiality: undertakings by either party not to divulge secret or confidential information or other know-how so long as it has not become public knowledge;

- (b) Restriction on use of know-how after an expiry of agreement: an undertaking by the sub-contractor not to use, even after expiry of the agreement, know-how or other secret information received during the currency of the agreement whilst that know-how or secret information is not in the public domain. Restrictions on use of know-how gained other than through the agreement are restrictive;
 - (c) Non-exclusive improvement grants: undertakings by the sub-contractor to pass on to the contractor on a non exclusive basis any technical improvements made during the currency of the agreement are not restrictive. The same applies in respect of licences for improvement patents taken out by the sub-contractor for the term of the patent held by the contractor;
 - (d) Exclusive improvement grants: where in (c) above the improvement patent is only effective in conjunction with the contractor's know-how or patent then the sub-contractor may be required to grant an exclusive licence to the contractor. Such a clause is declared not to restrain competition;
 - (e) Trade marks: the contractor may prohibit the sub-contractor from using the contractor's trade mark, trade name or get up in respect of goods, services or work not supplied to the contractor.
- (iii) Prohibited clause: Research and Development
- Any clause limiting the sub-contractor's right to dispose of the results of his own R & D restrains competition. In such situations the sub-contracting relationship does not displace the ordinary rules on disposal of intellectual property rights and known-how.²⁰⁵

II. United Kingdom Law

There are no special rules on intellectual property licensing in sub-contracting agreements. Hence the rules described above in respect of patents, copyright, trade marks and know-how apply.

FOOTNOTES

1. O.J. 1984 L 219/15 (16.9.84).
2. (Case 258/78) [1983] C.M.L.R. 278, [1982] E.C.R. 2015; and Commission decision, [1978] 3 C.M.L.R. 434 discussed Korah, (1983) Antitrust Bulletin 699.
3. See, Fourteenth Commission Competition Report (1984) pp. 40-42 paras. 31-35.
4. [1983] C.M.L.R. 278; [1982] E.C.R. 2015 at para. 58 of the judgment.
5. *ibid.*, at para. 53 of the judgment. "Closed" licenses are well established as falling within Article 85(1) EEC: EMI Records v. CBS United Kingdom (Case 51/75) [1976] 2 C.M.L.R. 235, [1976] E.C.R. 811; Tepea BV v. Commission (Case 28/77) [1978] 3 C.M.L.R. 392, [1978] E.C.R. 1391.
6. See Knoll-Hille Form Thirteenth Commission Competition Report (1983) at p. 91.
7. *c.f.* Nungesser v. Commission *supra.* at para. 43 of the judgment. The case concerned plant breeders rights, the Court denied that they justified treatment different from that accorded to other species of intellectual property. See also Knoll-Hille Form *ibid.*, which concerned patents and copyright.
8. See generally, Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1981) at pp. 24-25, 245-250, 405-408, 573-578; Guy and Leigh, *The EEC and Intellectual Property* (1981) Chs. 8, 9; Merkin and Williams, *Competition Law: Antitrust Policy in the United Kingdom and the EEC* (1984) Ch. 7 (for an overview); Wyatt and Dashwood, *The Substantive Law of the EEC* (1980) Ch. 21 (for an overview).
9. See e.g. Parke, Davis v. Centrafarm (Case 24/67) [1968] C.M.L.R. 47, [1968] E.C.R. 55 at p. 71.
10. Procureur du Roi v. Dassonville (Case 8/74) [1974] 2 C.M.L.R. 436; [1974] E.C.R. 837.
11. See British Leyland v. Armstrong Patents [1984] 2 C.M.L.R. 102 at p. 125; Centrafarm v. Sterling Drug (Cases 15,16/74) [1974] 2 C.M.L.R. 480, [1974] E.C.R. 1147; Merck v. Stephar (Case 187/80) [1981] E.C.R. 2063; Allen & Hanburys v. Generics (UK) Ltd. [1985] F.S.R. 229 at p. 241.
12. Centrafarm v. Sterling Drug (Cases 15,16/74) [1974] 2 C.M.L.R. 480, [1974] E.C.R. 1147, noted, Van Nieuwenhoven Helbach (1976) 13 C.M.L. Rev. 37; and, Deutsche Grammophon v. Metro (Case 78/70) [1971] C.M.L.R. 631, [1971] E.C.R. 487. See Cornish *op.cit.*, at pp. 245-250.
13. Centrafarm v. Sterling Drug *supra.* at paras. 9 and 11 of the judgment respectively, discussed in Guy and Leigh, *op. cit.*, at p. 128 et seq.
14. Kalwar/Plast Control v. Kabelmetal Twelfth Commission Competition Report (1982) p. 73.
15. See IBM Settlement [1984] 3 C.M.L.R. 147.

16. British Leyland v. T.I. Silencers [1981] F.S.R. 213.
17. O.J. 1984 L 219/15 (16.8.84).
18. para. 2 of the preamble.
19. See, Convention for the European patent for the Common Market (Community patent convention) of 15 December 1975, O.J. 1976 L 17/1 (21 January 1976). See generally Guy and Leigh, The EEC and intellectual property (1981) at Chs. 13 and 14.
20. Convention on the grant of European patents of 5 October 1973, Guy and Leigh, op. cit., at Chs. 13, 14.
21. Article 10 of the Regulation and para. 4 of the preamble. Under Article 1(1)(b) of Regulation 19/65/EEC, O.J. 1965 p. 533/65 (6 March 1965) the Commission has general legislative competence to provide bloc-exemptions for: patents, utility models, designs or trade marks, or 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. There is scope therefore for future legislation.
22. Article 11 of the Regulation and para. 6 of the preamble.
23. "Connected undertakings" as defined in Article 12.
24. Though where the license affects a non-EEC state there may be no effect on inter-State trade and hence no cause for Article 85 to apply. See e.g. Raymond - Nagoya [1972] C.M.L.R. D45: license between German licensor and Japanese licensee for licenses in Japan and other states in the Far East - negative clearance given.
25. paras. 4 and 5 of the preamble.
26. O.J. 1983 L 173/1. See Chapter 10 for details.
27. para. 7 of the preamble.
28. Though reciprocal agreements which do not involve any territorial restrictions within the EEC are within the exemption - para. 8 of the preamble.
29. para. 8 of the preamble. Though see Fourteenth Commission Competition Report (1984) at p. 41 para. 34(3), Commission hints that these licenses might be accorded a bloc-exemption at some future time.
30. e.g. Kabelmetal [1975] 2 C.M.L.R. D40; Davidson Rubber [1975] C.M.L.R. D52; and Burroughs - Delplanque [1972] C.M.L.R. D67.
31. para 9 of the preamble.
32. Reuters - BASF [1976] 2 C.M.L.R. D44 at p. D56 - D60; but c.f. Kabelmetal [1975] 2 C.M.L.R. D40 where the Commission decided that an obligation on a licensee to keep secret the communicated know-how was not a restriction within Article 85(1); Burroughs - Delplanque [1972] C.M.L.R. D67 - obligation on licensee not to use the communicated know-how after the end of the agreement or to pass it on to third parties during the agreement or for ten years after its conclusion was not a restriction with Article 85(1); Schlegel [1983] 2 C.M.L.R. 179 - license of know-how on a non-exclusive basis subject to payment of periodic royalties not caught by Article 85(1).

33. para. 10 of the preamble, and, Article 1(1)(7) of the Regulation.
34. e.g. Davidson Rubber [1972] C.M.L.R. D52; AOIP Beyrard [1976] 1 C.M.L.R. D14; Peugot - Zimmern Bull E.C. 11/76 at para. 2120.
35. Nungesser v. Commission (Maize Seed) (Case 258/78) [1982] E.C.R. 2015; [1983] C.M.L.R. 278 at para. 58 of the judgment. See Turner, Competition and the Common Market after Maize Seed (1983) E.L. Rev. 103.
36. See Commission Working Document on the Regulation. Com. Doc. IV/84/1 at 4.
37. See Nungesser v. Commission (Maize Seed) (Case 258/78) [1982] E.C.R. 2015; [1983] C.M.L.R. 278 at para. 61 of the judgment approving, Consten and Grundig v. Commission (Cases 56 and 58/64) [1966] C.M.L.R. 418, [1966] E.C.R. 299.
38. See Maize Seed [1978] 3 C.M.L.R. 434 at p. 455 (Commission decision) - Commission recognise that export bans may be acceptable where the exclusivity is needed to protect small or medium sized undertakings in their attempts to penetrate new markets or promote new products provided that parallel imports are not impeded at the same time.
39. [1979] 1 C.M.L.R. 511. See also Compari [1978] 2 C.M.L.R. 397.
40. e.g. AOIP - Beyrard [1976] 1 C.M.L.R. D14.
41. In British Leyland v. T.J. Silencers [1980] 1 C.M.L.R. 598 it was held by the High Court in London that the extension of the obligation to pay royalties to an unprotected product is not an abuse of Article 86 EEC where the extension merely is a device for calculating royalties on the protected rights; see also UARCO Fourteenth Commission Competition Report (1984) at p. 77 which appears to confirm this view.
42. See Article 3(5) of the Regulation; Fourth Commission Competition Report (1974) at para. 31; and also the Maize Seed case [1978] 3 C.M.L.R. 434 at p. 451 (Commission); and (Case 258/78) [1983] C.M.L.R. 278; [1982] E.C.R. 2015 at para. 32 of the judgment (European Court).
43. But c.f. IGR Fourteenth Commission Competition Report (1984) p. 76 where a trade association which holds its members patents uses its power to charge excessive royalties this will infringe Article 85(1) EEC. See also Davidson Rubber [1972] C.M.L.R. D53 at para. 18; Glaserstetter Bull E.C. 8/70 at p. 68; and Henkel - Colgate O.J. 1972 L 14/14.
44. See Article 3(4) which implies that this is acceptable and also see Article 3(2) of the Regulation which condones the analogous situation of royalties being paid by a licensee for use of secret know-how even though the related patents have expired. See also UARCO Fourteen Commission Competition Report (1984) at p.77
45. e.g. Burroughs - Delplanque [1972] C.M.L.R. D67; Burroughs - GEHA [1972] C.M.L.R. D 72; Davidson Rubber [1972] C.M.L.R. D52; Compari [1978] 2 C.M.L.R. 397.
46. Burroughs - Delplanque [1972] C.M.L.R. D67 at Section II of the decision; and, Burroughs - GEHA [1972] C.M.L.R. D72 at Section II of the decision.

47. Burroughs Delplanque [1972] C.M.L.R. D67; Kabelmetal [1975] 2 C.M.L.R. D40 at para. 8(iv).
48. [1979] 1 C.M.L.R. 511 at para. 14 of the decision. See also Davidson Rubber [1972] C.M.L.R. D52; Raymond - Nagoya [1972] C.M.L.R. D45; AOIP - Beyrard [1976] 1 C.M.L.R. D14; AGA Steel Radiators Bull E.C. 7, 8/77 at p. 33 noted Seventh Commission Competition Report (1977) at p. 105; VEB Pentacon - Elbe Kamera GmbH Bull E.C. 10/70 at p. 31. The Commission have followed the judgment of the U.S. Supreme Court in Lear v. Adkins 395 U.S. 653 (1969). See for commentary, Joelson (1978) 23 Antitrust Bulletin 835 at pp. 856, 857.
49. Burroughs - Delplanque [1972] C.M.L.R. D67; Burroughs - Geha [1972] C.M.L.R. D72. Campari [1978] 2 C.M.L.R. 397
50. Raymond - Nagoya [1972] C.M.L.R. D45. But for a case deciding that an obligation on the licensee to manufacture according to the licensor's technical specification restricted competition see Video Cassette Recorders [1978] 2 C.M.L.R. 160, the obligation prevented licensees from changing to the manufacture and distribution of competing systems.
51. Davidson Rubber [1972] C.M.L.R. D52.
52. Exclusive licenses restrain competition see e.g. Raymond - Nagoya [1972] C.M.L.R. D45.
53. AOIP - Beyrard [1976] C.M.L.R. D14 at p. D23; Peugot - Zimmern Bull E.C. 11/76 at para. 2120 noted Sixth Commission Competition Report (1976) at p. 83.
54. Davidson Rubber [1972] C.M.L.R. D52; Kabelmetal [1975] 2 C.M.L.R. D40.
55. Kabelmetal [1975] 2 C.M.L.R. D40 at para. 8(i).
56. See para. 20 of the preamble to the Regulation.
57. See Article 2(1)(8) and accompanying text.
58. This is accepted Commission policy - AOIP - Beyrard [1976] 1 C.M.L.R. D14.
59. *ibid.*
60. *ibid.*, at D.23.
61. See para. 21 of the preamble.
62. Maize Seed [1978] 3 C.M.L.R. 434; AOIP - Beyrard [1976] 1 C.M.L.R. D14 at p. D.24; but c.f. Campari [1978] 2 C.M.L.R. 397 at para. II(2) (though in special cases such clauses may be acceptable where trade marks are concerned).
63. Fourth Commission Competition Report (1974) para. 30.
64. See e.g. IMA - Windsurfing [1984] 1 C.M.L.R. 1 noted Thirteenth Commission Competition Report (1983) at p. 90; and, UARCO Fourteenth Commission Competition Report p. 77; Preflex - Lipski Bull E.C. 5/80 at p. 34.

65. Reuter - BASF [1976] 2 C.M.L.R. D44; See also para. 22 of the preamble to the Regulation. Domestic Courts might extend the period where they wish to punish a licensee.
66. c.f. Maize Seed [1978] 3 C.M.L.R. 434 at para. 25(f) (Commission decision); and, para. 23 of the preamble to the Regulation.
67. Maize Seed supra at paras. 25(e) and 36; and, para. 23 of the preamble to the Regulation.
68. See Hayward, Patent Licensing in the EEC, (1980) 35 Business Lawyer at pp. 455 and 471; and, Handler and Blechman, An American view of the Common Market's Proposed Group Exemption for Patent Licenses (1980) 14 International Lawyer 403 at pp. 420, 421, for commentary on problems with this issue and with earlier drafts of the Regulation.
69. The Commission are concerned to ensure that licensees enjoy proper incentives to be inventive themselves, this entails some protection from the licensor. See para. 24 of the preamble. See also Raymond - Nagoya [1972] C.M.L.R. D45. In Kabelmetal [1975] 2 C.M.L.R. D40 the Commission stated that they wished licensees to enjoy and profit from a freedom to innovate and grant licenses of their own. See also Nodet Gougis - Lamazu Tenth Commission Competition Report (1980) at p. 88, Commission objected to a clause making the licensor joint owner of the improvement patents since this would give the licensor an undeserved advantage.
70. Kabelmetal [1975] 2 C.M.L.R. D40 at para. 8(iii) of the decision.
71. *ibid.* But see Davidson Rubber [1972] C.M.L.R. D52 at D60 non-exclusive improvement license clause held not to have an appreciable effect on competition. The Commission stated this to be true "of the obligation on each exclusive licensee to grant Davidson and its other licensees licenses to possible improvements which it would have made to the Davidson process given that this obligation is not exclusive and that each licensee thus retains the possibility of passing its acquired experiences to third parties and whereas it benefits from all technical data which Davidson holds or could acquire in the future."
72. para. 24 of the preamble.
73. Vaessen - Moris [1979] 1 C.M.L.R. 511 noted Zanon, (1980) E.L. Rev. 391.
74. [1978] 2 C.M.L.R. 397 at p. 409.
75. Bull E.C. 11/66 at p. 11; Press Release IP 30, 3 March 1966.
76. An almost identical provision exists in relation to the bloc-exemption for exclusive dealing, Regulation 83/83/EEC, O.J. 1983 L 173/1 Article 3(d), see also para. 11 of the preamble. For Commission commentary see para. 33 of the Explanatory notice O.J. 1983 C355/7.
77. Concast - Mannesmann Eleventh Commission Competition Report (1981) at p. 62 para. 93.
78. IGR Stereo Television Eleventh Commission Competition Report (1981) at pp. 63, 64 para. 94.
79. Video Cassette Recorders [1978] 2 C.M.L.R. 160.

80. c.f. Transocean Marine Paint I [1967] C.M.L.R. D9. The pooling of disputed or conflicting patents may also be exemptable where it enables the parties to exploit the relevant technology free from the threat of legal action.
81. For guidance on this area see Maize Seed [1978] 3 C.M.L.R. 434 (Commission decision); and, Nungesser v. Commission (Maize Seed) (Case 258/78) [1982] E.C.R. 2015, [1983] C.M.L.R. 278 (Court of Justice). The Commission decision is informative on various types of common licensing clause, the judgment of the Court lays down the position as regards exclusivity and territorial protection.
82. See Fourteenth Commission Competition Report (1984) at p. 41 para. 34(3).
83. e.g. Burroughs - Delplanque [1972] C.M.L.R. D 67 at p. D71; Davidson Rubber [1972] C.M.L.R. D52 at p. D60; Kabelmetal [1975] 2 C.M.L.R. D40; Preflex - Lipski Bull E.C. 5/80 at p. 34.
84. In an earlier draft version of the Regulation published unofficially at [1977] 1 C.M.L.R. D25 the Commission required parties to disputes settled by arbitration to notify the results of the settlement to them. This would have enabled them to ensure that arbitrators complied with the law.
85. e.g. Bronbemaling v. Heidemaatschappij [1975] 2 C.M.L.R. D67; Sirdar - Phildar [1975] 1 C.M.L.R. D93 (trade mark dispute) c.f. Penneys [1978] 2 C.M.L.R. 100 (settlement of a trade mark war); Nielson - Hordell/Richmark Twelfth Commission Competition Report (1982) p. 73 (settlement of copyright dispute).
86. c.f. Pentacon Eighth Commission Competition Report (1978) at para. 119.
87. A similar provision exists in the bloc-exemption on Exclusive dealing, Regulation 83/83/EEC, O.J. 1983 L 173/1 Article 6(a). See for Commentary Chapter 10 Section B, and for the Commissions' view of the meaning of "equivalent" para. 21 of the explanatory notice to the Regulation O.J. 1983 C 355/7
88. See, Fourteenth Commission Competition Report (1984) at p. 42 para. 35.
89. Article 215(2) EEC reads: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."
90. But see the Ministerial Statements made in connection with the Competition Bill H.C. Committee Rep. (22 November 1979) Cols. 383-385.
91. Ravenseft Properties v. Director General of Fair Trading [1977] 1 All E.R. 47 (Q.B.D.), DGFT Annual Report (1976) p. 36. See Chapter 2 Sections L, N.
92. *ibid.*
93. Sections 9(3) and 18(2) RTPA 1976. Discussed generally in Chapter 1 Section E.
94. MMC Investigation into Sheffield Newspapers Cmd. 8664 (1983) at pp. 54, 55 para. 7.12.
95. See Statement of Minister concerning clause 16 competition Bull H.C. Committee Rep. (13 December 1979) cols. 673-675. Clause 16 became Section 14 CA 1980.

96. Inserted into the Patents Act 1977 by Section 14(1) Competition Act 1980.
97. Section 51(5A) inserted by Section 14(3) Competition Act 1980.
98. As defined by Section 32 Patents Act 1977.
99. e.g. MMC General Reports on: Industrial and Medical Gases H.C. 83 (1956) pp. 13-15 paras. 32-37, and, p. 92 para. 251; Cigarette Filter Rods H.C. 335 (1969) pp. 49-51, paras. 158-165; Chlordiazepoxide and Diazepam H.C. 197 (1973) pp. 58, 59 paras. 197-199.
100. H.C. 1 (1966) at p. 101 para. 248.
101. H.C. 83 (1968) at p. 72 para. 244.
102. H.C. 47 (1976) at pp. 93-95 paras. 384-392.
103. *ibid.*, at p. 94 para. 387.
104. Section 48(1) Patents Act 1977.
105. Section 48(4).
106. Section 49(2).
107. Cornish, *op. cit.*, at p. 252.
108. See Demaret, Patents, Territorial Restrictions and EEC Law (1978) p. 86 n.30.
109. [1982] R.P.C. 361 per Whitford J. But c.f. Pharmon BV v. Hoechst AG (Case 19/84) (unreported, judgment July 9, 1985) which suggests that Whitford J. might have been on the right track.
110. See Convention of December 15, 1975 for the European Patent for the Common Market O.J. 1976 L17/1. In particular see Articles 47 and 82. Article 47 has been implemented by Section 53 of the Patents Act 1977.
111. e.g. Kent's Patent (1909) 26 R.P.C. 666.
112. e.g. Kamborian's Patent [1961] R.P.C. 403.
113. See Re Penn [1973] R.P.C. 233.
114. See Robin Electric Lamp Co.'s Petition (1915) 32 R.P.C. 202.
115. e.g. Kamborian's Patent [1961] R.P.C. 403; Brownie Wireless Application (1929) 44 R.P.C. 457; Robin Electric Lamp Co.'s Petition (1915) 32 R.P.C. 202.
116. Kamborian's Patent [1961] R.P.C. 403; Colbourne Engineering Co.'s Application [1955] 72 R.P.C. 169.
117. Section 50(1) Patents Act 1977. See Cornish, *op. cit.*, at pp. 254-257.
118. McKechnies Application (1943) 51 R.P.C. 461 - the patentee may not seek to fend off an application by last minute activity giving an impression of effective exploitation.

119. Section 50(2).
120. See Brownie Wireless Application (1929) 46 R.P.C. 457 at p. 473.
121. (Case 19/84) (unreported, judgment July 9, 1985).
122. Under Section 41 Patents Act 1949, the predecessor to the compulsory licensing provisions of the 1977 Act.
123. Applying the principle in Merck v. Stephar (Case 187/80) [1981] E.C.R. 2063 that the substance of a patent right lay essentially in according the inventor an exclusive right of first marketing to enable him to obtain the reward for his creativity.
124. e.g. Huntoon v. Kolynos [1930] 1 Ch. 528 (C.A.).
125. Section 44(3) Patents Act 1977.
126. Article 3(9) Regulation 2349/84/EEC.
127. Section 44(4)(b)
128. See e.g. Tool Metal v. Tungsten Electric (1955) 72 R.P.C. 209 (H.L.) at pp. 218-221 but c.f. dissent at pp. 214 et seq. See also Hunters Patent [1965] R.P.C. 416 at pp. 426, 427 where the Irish Supreme Court rejected the legality of a license to use the patented machinery only in contracts for the supply of the other (tied) product (bottle tops). In this license there was no restriction only a permission to use. See also Sarason v. Frenay [1914] 2 Ch. 474 (C.A.).
129. e.g. Neilson - Hordell/Richmark Twelfth Commission Competition Report (1982) p. 73; BBC - Valley Printing Sixth Commission Competition Report (1976) para. 163; "Old Man and the Sea" Sixth Commission Competition Report (1976) para. 163; Ernest Benn Ltd. Ninth Commission Competition Report (1979) para. 118. STEMRA Eleventh Commission Competition Report (1981) p. 66; Membran and K-tel International v. GEMA (Cases 55, 57/80) [1981] E.C.R. 147; Dutch Books [1977] 1 C.M.L.R. D2.
130. (Case 258/78) [1983] 1 C.M.L.R. 278, [1982] E.C.R. 2061.
131. Thirteenth Commission Competition Report (1983) p. 91.
132. *ibid.*, at para. 144.
133. Coditel v. Cine Vog Films (Case 262/81) [1983] 1 C.M.L.R. 49, [1982] E.C.R. 3381.
134. *ibid.*, at para. 15 of the judgment. The Court indicated that in certain economic circumstances such a license might infringe Article 85(1): (i) where the exclusive license created artificial and unjustifiable economic barriers; (ii) where royalties charged exceeded a fair return on investment; (iii) where the exclusivity was for an undue period of time; and (iv) where in general terms the license restricts competition (*ibid.*, at para. 19).
135. Twelfth Commission Competition Report (1982) p. 73.

136. Parke Davis v. Probel (Case 24/67) [1968] C.M.L.R. 47, [1968] E.C.R. 55; and see British Leyland v. Armstrong Patents [1984] 3 C.M.L.R. 102 (C.A.).
137. See IBM Settlement Case [1984] 3 C.M.L.R. 147.
138. (Cases 55, 57/80) [1981] E.C.R. 147; See also, Deutsche Grammophon v. Metro (Case 78/80) [1971] C.M.L.R. 631, [1971] E.C.R. 487. See generally Copinger and Skone James on Copyright (12th ed., 1980) pp. 449-464.
139. See Coditel I (Case 62/79) 19 [1980] E.C.R. 833.
140. [1984] 3 C.M.L.R. 147; Bull E.C. 10/84 appendix 4.
141. See also "Old Man and the Sea" [1977] 1 C.M.L.R. D121 one publisher held the license for a book for the whole of the EEC and sub-licensed its rights for the whole of the Community excepting the UK and Eire. However it failed to make copies available in Eire. Following Commission intervention the publisher appointed a sub-licensee for Eire.
142. See e.g. No. 5079 Register of Restrictive Trade Practices, W & T Manufacturing (Birmingham) Ltd. and J & L Randall Ltd. (1984)
143. 21 March 1984 (OFT Report). See also the MMC Report on the Case Cmnd. 9437 (1985) at p. 31 para. 6.3; and OFT Report British Broadcasting Corporation and Independent Television Publications Ltd (The publication of programme information) (13 December 1984) p. 59. para. 8.3.
144. *ibid.*, at pp. 37, 38 paras. 8.4, 8.5.
145. *ibid.*, at p. 38 paras. 8.7, 8.8.
146. *ibid.*, at p. 40 para. 8.14.
147. British Leyland v. TI Silencers [1981] 2 C.M.L.R. 75 at p. 81.
148. MMC Report *supra*. at p. 38 para. 6.34.
149. *ibid.*, at p. 41 para. 6.50.
150. 13 December 1984.
151. *ibid.*, at p. 63 para. 8.19.
152. *ibid.*, at pp. 63, 64 paras. 8.20, 8.21.
153. See e.g. Weatherby v. International Horse Agency & Exchange [1910] 2 Ch. 297 at p. 305 per Parker J.; Hawkes & Son (London) Ltd. v. Paramount Film Service Ltd. [1934] Ch. 593 at p. 603 per Lord Hanworth M.R.; Copinger and Skone James on Copyright 12th edn., para. 463.
154. Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust [1927] A.C. 343 at p. 363, 364 per Lord Davey; See also, Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd. [1919] A.C. 744 at p. 752 (H.L.) "in unequivocal terms"; Westminster Bank Ltd. v. Minister of Housing and Local Government [1971] A.C. 50 H at p. 529 per Lord Reid (H.L.).

155. De Smith, Judicial Review of Administrative Act 4th Ed., at p. 325.
See also, A.G. v. Horner (1884) 14 W.B.D. 254 at p. 257 per Brett L.J.
156. Newcastle Breweries Ltd. v. The King [1920] 1 K.B. 854 at pp. 866, 867 per Salter J.
157. Section 10(2)(b) CA 1980.
158. Section 10(2)(a) CA 1980.
159. MMC Report Ford Motor Company supra, at p. 42 para. 6.57.
160. *ibid.*, at p. 43 paras. 6.58, 6.59.
161. Section 31(3) CA 1980.
162. See Hoffman-La Roche v. Secretary of State for Trade and Industry [1975] A.C. 295 at p. 365 per Lord Diplock, at p. 349C per Lord Morris; and at p. 372 per Lord Cross. An order approved by affirmative resolution of Parliament, and a fortiori an order that it has failed to annul, remains subject to the powers of judicial review vested in the courts.
163. MMC Report supra. at p. 43 para. 6.61. The MMC suggested changes in the period of protection given under the Registered Designs Act 1949 (reduction from 15 to 5 year maximum); amendment along similar lines to Section 10 Copyright Act 1956; limitation of period of protection to designs not registrable under the Registered Designs Act 1968 to a period not exceeding 5 years under the Copyright Act 1956 (*ibid.*, at para. 6.68).
164. See Copinger and Skone James on Copyright (12th ed. 1980) Ch. 28 for analysis of the various conventions and revisions. See also pp. 851 et seq. for text of Berne Convention as amended by Paris Revision 1971.
165. Paragraph 2.6(a) of the "Guide to the Berne Convention" (WIPO) provides that, "literary and artistic works" includes "... almanacs, year books, programmes, guides etc. irrespective of their contents, their length, their purpose (entertainment, education, information, discussion, advertisement, propoganda etc.) and their form (manuscript, typescript, printing)."
166. See Official Report of the Stockholm meeting as quoted in the Whitford Committee Report Cmnd. 6732 para. 60: "If it is considered that reproduction conflicts with the normal exploitation of a work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible, in certain special cases, to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies it may not be permitted, as it conflicts with the normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made photocopying may be permitted without payment particularly for individual or scientific use."

167. [1978] 2 C.M.L.R. 397.
168. O.J. 1984 L 219/15.
169. *ibid.*, at para. 10 of the preamble.
170. (Case 258/78) [1983] 1 C.M.L.R. 278; [1982] E.C.R. 2061.
171. See Joliet, Territorial and Exclusive Trademark Licensing under the EEC law of Competition (1984) I.I.C. 21 at p. 31. But c.f. Everling, Zur neueren EuGH - Rechtsprechung Zum Wettbewerbsrecht, (1982) Eur. 301 at p. 310.
172. [1978] 2 C.M.L.R. 397.
173. *ibid.*, at II(C).
174. *ibid.*
175. *ibid.*
176. Regulation 83/83/EEC, O.J. 1983 L 173/1. See also Article 2(3)(C) of Regulation 84/83/EEC O.J. 1983 L 173/5 on bloc-exemption for certain categories of exclusive purchasing. See Chapter 10 for commentary.
177. Campari [1978] 2 C.M.L.R. 397 at para. III (1), (3). Criticised, Joliet, *op. cit.*, at pp. 30, 31. Consten & Grundig v. Commission (Case 56, 58/64) [1966] C.M.L.R. 418, [1966] E.C.R. 299.
178. *ibid.*, para. III (2).
179. Indeed non competition clauses of this nature are "black clauses" in the Regulation, see Article 3(3).
180. Campari *supra*. at para. II(2). See for confirmation of the Commission rejection on non-competition clauses of this nature: Maize Seed [1978] 3 C.M.L.R. 434; AOIP - Beyrard [1976] 1 C.M.L.R. D14. Such clauses do not relate to the existence of the patent but constitute restraints under Article 85(1). See further Fourth Commission Competition Report (1974) at para. 30.
181. e.g. Penneys [1978] 2 C.M.L.R. 100 noted Seventh Commission Competition Report (1977) p. 110; Toltecs - Dorcet [1983] 1 C.M.L.R. 412.
182. See, Guy and Leigh, The EEC and Intellectual Property (1981) Ch. 12 esp. at pp. 219 et seq.
183. (Case 192/73) [1974] 2 C.M.L.R. 127, [1974] E.C.R. 731; See also Terrapin v. Terranova (Case 119/75) [1976] 2 C.M.L.R. 482, [1976] E.C.R. 1039; Persil Trade Mark Seventh Commission Competition Report (1977) p. 108, Bull E.C. 1/78 at p. 28.
184. See for analysis of the case and its implications, Guy and Leigh *op. cit.*, at pp. 219-225.
185. e.g. EMI v. CBS (Case 51/75) [1976] 2 C.M.L.R. 235, [1976] E.C.R. 811.
186. Terrapin v. Terranova (Case 119/75) [1976] 2 C.M.L.R. 482, [1976] E.C.R. 1039.

187. The Commission have confirmed this. Toltecs - Dorcet [1983] 1 C.M.L.R. 412 for judgment of the European Court see BAT Cigaretten - Fabriken GmbH v. Commission (Case 35/83) [1985] 2 C.M.L.R. 470.
188. Kabelmetal [1975] 2 C.M.L.R. D40 at para. II(8)(iv).
189. Davidson Rubber [1972] C.M.L.R. D52 at para. IV(17) export ban in know-how license unacceptable.
190. Schlegel [1984] 2 C.M.L.R. 179.
191. O.J. 1984 L 219/15.
192. *ibid.*, at para. 9 of the preamble.
193. *ibid.*, Article 4.
194. But c.f. Burroughs - Delplanque [1972] C.M.L.R. D67 at para. II.
195. But royalties should not be required where the licensee has not used the know-how: Spitzer - Van Hool Twelfth Commission Competition Report (1982) p. 72.
196. *ibid.*, see also paras. 20 and 22 of the preamble, and Article 3(2) Regulation 2349/84/EEC.
197. para. 22 of the preamble to Regulation 2349/84/EEC.
198. *ibid.*
199. Spitzer - Van Hool Twelfth Commission Competition Report (1982) p. 72. See Chapter 9 on Exchange of Information for details of the risks attached to access to rival's business secrets.
200. No. ~~5044~~ Register of Restrictive Trade Practices (1983).
201. O.J. 1979 C1/2 supplementing the Commission notice on co-operation between enterprises O.J. 1968 C75/3. See also Commission answer to W.Q. No. 1092/79 O.J. 1980 C74/36 outlining the Commission's involvement in sub-contracting policy.
202. *ibid.*, para. 2.
203. See Commission answer to W.Q. Nos: 2015/82, 2016/82, 2017/82, O.J. 1983 C 189/7.
204. *ibid.*, paras. 3, 4.
205. *ibid.*, para. 4.

CHAPTER 14

TRADE ASSOCIATION MEMBERSHIP

A. INTRODUCTION

In this chapter the following are discussed:

- Section B: Membership fees - analysis of when fees and levies may breach EEC competition rules and other general EEC law. Consideration of the scope of the exemption in UK law.
- Section C: Rules for membership - analysis of legality of imposing strict conditions for admission to membership.
- Section D: Inter-member Exclusive Dealing - closed systems. Analysis of association rules requiring members to only trade with other members or with members of other approved trade associations.
- Section E: Guilt by membership - consideration of when a member can be liable under competition law for activities undertaken by the association.

B. MEMBERSHIP FEES

Trade associations usually gear their fee structures to the members ability to pay, though a floor and ceiling fee might also be imposed to prevent too great a disparity between small and large members. Care must be taken to ensure that fee structures are not used in an anti-competitive manner. If Association X accounts for 90% of the firms in the market and imposes a fee structure which operates to deter new members this might be viewed as an attempt to create entry barriers to new entrants since membership of the association might be perceived as essential for any serious producer. Where the fee demanded is prohibitively high this might deter new firms or at least increase their entry costs. Similarly, the data collected about fees can be used restrictively. Where the fee paid is calculated by reference to a well known formula based upon firm size (for example turnover, total billings, payroll etc.) then dissemination of such data to members will give them information about their rivals capacity that might otherwise be considered confidential. Thus, the amount of fees paid and the figures upon which they are based should not be disclosed.

It is the view of the European Court that membership fees have their basis in the law of contract and that association membership is a contractual relationship.¹

I. EEC Law

(i) Under Article 86 EEC

There is very little guidance on Commission policy towards membership fees imposed by dominant associations. In BRT v. SABAM the Court ruled that a copyright society which managed the copyright of its members (authors, composers) could not impose obligations on members which exceeded the limits absolutely necessary for the attainment of the legitimate objectives of the association.² On this basis fees should be related to the value of services provided and perhaps the ability of the member to pay. The imposition of excessive or unfair terms may infringe Article 86(a) EEC which prohibits the imposition of unfair trading conditions.

If an association which enjoys a de facto monopoly, for example a copyright society in a single Member State, were to discriminate in the fees demanded from members according to non-justifiable criteria this might infringe Article 86 EEC. If the fees were set so as to exclude a certain type of firm from membership then this might also represent an abuse of dominance. This might particularly be so where membership of the association is important to commercial success and/or where the association is seeking to exclude firms employing new and innovative methods from entering the market.

It might well be an abuse of dominance for an association to impose excessive fee demands on applicants who compete with the existing membership when reasonable fees are imposed on applicants who do not compete.³

(ii) Under Article 85 EEC

The extent to which Article 85(1) applies to fees is uncertain. Where the association compiles statistics based upon data used to calculate a members fees that data should not be disseminated to the membership in individualised form which permits members to identify the fees paid by other members. Such data may assist members to learn of confidential matters relating to other firms. See Chapter 9 for further details of this question.

(iii) Under Articles 9-17 EEC: Import/Export charges

Where a statute or other instrument requires traders to belong to an association and pay a membership fee as a condition of being allowed to import or export goods this may well be prohibited under Articles 9-16 EEC. These prohibit all customs duties on imports and exports and all measures of equivalent effect. These provisions are directly effective and may be pleaded before the national court as the basis of an action for restitution of the fee paid. The European Court has in other contexts condemned: fees charged by a national agricultural intervention agency for the issue of import licenses;⁴ fees charged on all imports and exports to off-set the cost of compiling statistical records the availability of which is alleged to benefit the traders;⁵ and fees charged to defray the cost of health and sanitary inspections.⁶ The Court has, however, stated that in exceptional cases a charge may be justified where it is in consideration for some service provided and where it does not exceed either the value or the cost of the service.⁷ Thus, an association set up by Government to provide publicity and advertising might be justified in imposing a charge on exporters.⁸

It should be stressed that for Articles 9-17 EEC to apply the charge must be levied in accordance with a governmental requirement and the fee must legally count as a charge of equivalent effect to a customs duty

II. United Kingdom Law

(i) Under the RTPA 1976

~~An~~ obligations on any party to an agreement to make a payment based upon the quantity of goods or services supplied is viewed as registrable under Section 6(1)(d) for goods (restriction on quantity of goods supplied) and Section 11(2)(c) for services (restriction on extent to which services supplied).⁹ Thus, prima facie, membership fees based upon turnover or other analogous quantitative criteria are registrable. However, the Act expressly excludes (in Sections 6(4) and 17(2) RTPA 1976) membership fees from Sections 6(1)(d) and 11(2)(c) where the payments consist of bona fide subscriptions for membership of the association. Thus, where member X pays £500 membership per annum based upon an annual turnover of £1m and Y pays £1000 on the basis of a £2m annual turnover the obligation to pay according to turnover is not registrable. This exemption only applies to bona fide subscriptions. Where members pay a fee for services rendered, for example national

advertising performed by the association, then any agreement as to fees paid for the services is presumably registrable as a restriction on the prices to be paid for services supplied under Section 11(2)(a) RTPA 1976. For discussion of the funding of national advertising see Chapter 11 Section

It is difficult to know precisely where a bona fide subscription ends and a consideration for services rendered commences. If the association charges a membership fee and a separate fee to cover advertising or other services rendered then the membership fee and the service charge are differentiated and only the former is exempted from the Act. However, if the association charges a single subscription fee which is calculated to cover the cost of all services rendered then the fee might be exempt although in economic effect it is indistinguishable from the first example. The exemption in the Act refers only to a bona fide subscription for membership. It is arguable that a "subscription" that includes a cost component for services rendered goes beyond mere membership. Where an association is doubtful as to the registrability of its membership fee structure they might consider furnishing details to the OFT on a fail safe basis. (See Chapter 4 for details).

(ii) Under the CA 1980

Presumably under the CA 1980 the practice of a trade association in using membership fees in an anti-competitive manner is reviewable by the OFT and MMC where the fees are exempt from the RTPA 1976. It would have to be established as a preliminary question that the association satisfied the criteria of Section 2(1) CA 1980 (see Chapter 3 for details). There is no case to date upon this issue.

C. RULES FOR MEMBERSHIP

An association may set membership requirements that seek to control the type of firm operating in the market. Thus, membership might be restricted to firms employing a minimum number of qualified staff, or having a floor space in excess of a specified minimum, or have stocking capacity of a certain level. Where association membership is a valuable commercial asset, as it may be where the association provides commercial data or other trade advantages, the membership rules may exert a significant influence over the market.

I. EEC Law

(i) Under Article 85 EEC

Trade association rules are treated as an agreement between members to comply with the rules.¹⁰ Thus stipulations in the articles of association imposing strict conditions on membership are deemed to have been agreed by the members. The Commission has, on this basis, condemned under Article 85(1) a rule which required members to own their business premises and not rent them.¹¹ A potential market entrant seeking association membership hence prevented from leasing premises. This added to his entry costs and made him more expensive in the long run. It follows that membership rules should not lay down criteria designed to exclude different forms and methods of trading.¹² *Prima facie*, it is the right of each trader to decide how they will supply and the right of the customer to decide how they will be supplied; it is not the right of the association to make these decisions.

In some cases entry rules may impose strict conditions where they are necessary to protect the reputation of the industry or the interests of consumers. Thus the rules of an association of wine producers which only admits to membership firms whose production methods meet certain recognised technical standards would probably be suitable for exemption under Article 85(3) EEC provided the rules actually applied are the minimum necessary to meet the standards.¹³ Conditions may be *excessive* where they extend to personal characteristics of the trader (age, years experience etc.) and not to the minimum qualifications needed to carry out the trade in a reasonable manner.

(ii) Under Article 86 EEC

It is unlikely that Article 86 EEC would be applied to trade association rules since Article 85 EEC has traditionally been viewed as the most appropriate regulator of the constitutions and rules of associations of competitors. Though, Article 86 *might* be applied where an association provides a unique function in the market, for example it is a copyright society holding the copyrights of its members and licensing them on their behalf.¹⁴

(iii) Under Articles 30-36 EEC: Compulsory membership

Statutory requirements that traders belong to an association as a pre condition of import or export will almost inevitably be unlawful under Articles 30 (imports) or 34 (exports). The European Court has

stated in respect of exports: "... it is contrary to the freedom of commercial transactions for national legislation to make the exportation of the products in question conditional on the exporter's being affiliated to a public body or a body approved by an official authority."¹⁵ There is no reason to believe that a different rule would apply to imports. It makes no difference that membership is as of right i.e. a formality since no de minimis rule exists under Articles 30-36 EEC.¹⁶

Compulsory membership may, in exceptional cases, be justified under Article 36 which permits Governmentally imposed trade restrictions where justified on the basis of "... public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property" Moreover, the restriction chosen by the Government must be the minimum necessary to achieve the desired objective under Article 36 EEC. Thus, if a trader can establish that the interest described in Article 36 could be protected by a measure less restrictive of trade than compulsory affiliation then the compulsory affiliation rule is unlawful under Article 30 EEC.

II. United Kingdom Law

(i) Under the RTPA 1976

In Association of British Travel Agents¹⁷ (ABTA hereafter) the RPC was asked, inter alia, to assess the membership rules of ABTA against the public interest. Membership of ABTA is almost essential in the travel industry.¹⁸ Thus the membership conditions of the association act as effective entry requirements to the travel market. The RPC considered that many of these rules were overly restrictive. In particular ABTA imposed requirements as to staffing and premises which many small traders would have found costly to meet. The precise details of these requirements have already been discussed in Chapter 11 Sections H and I. With regard to the premises requirements the RPC stated that they,

"... impose a rigid structure on the industry which is not responsive to customer demand so that there is a danger that ... the industry will become fossilized. If the premises requirements continue to be enforced, the public will be denied the free choice of premises which should be theirs and the possibility (not necessarily the probability) of new, better and cheaper forms of marketing." ¹⁹

With regard to staffing requirements the RPC stated,

"... they may raise costs needlessly, and discourage technological and other forms of inventiveness. They stifle new forms of competition."²⁰

The concern of the RPC with restrictive entry requirements would appear to be two fold: First, restrictive rules may create entry barriers and thereby have a deterrent effect on potential entrants; and secondly, such rules artificially maintain the status quo thereby hindering the introduction of innovative and technologically advanced ideas. It should be added that these undesirable effects are only likely to occur where the association enjoys considerable market power i.e. membership is at a premium. Where this is not the case the incentive for traders to join the association and comply with its rules is weak and as such traders enjoy greater freedom to make their own decisions. Though as a general rule membership requirements only rarely involve registrable restriction. ABTA was exceptional in this respect.

D. INTER-MEMBER EXCLUSIVE DEALING - CLOSED SYSTEMS

Where membership of an association is a sine qua non to being able to conduct trade with other members or other traders then membership may be essential to commercial success. Thus, association rules banning members from dealing with non-members create significant entry barriers to the market. Likewise where a buyers association agrees with a sellers association that members will deal only with members of the other association then entry barriers are erected to non-members and a premium is placed upon membership.

I. EEC Law

Trade associations which operate closed systems infringe Article 85(1) and the systems will rarely be suitable for exemption under Article 85(3) EEC. The Commission object that closed systems represent unreasonable restraints on the sources of supply available to members, and, unreasonable entry barriers to non-members.²¹ Moreover, such systems solidify distributional patterns which make them less responsive to change.²²

Exclusive dealing agreements whereby one association agrees with another association that members of the former will only sell through members of the latter is not within the bloc-exemption for exclusive dealing in Regulation 83/83/EEC (see Chapter 10 for details).²³

II. United Kingdom Law

(i) Under the RTPA 1976

Trade association exclusive dealing is registrable under Sections 6(1)(f) and 11(2)(e) as a restriction on the persons or classes of persons who may be supplied to or purchased from. Such agreements are generally assumed to be unsuited to Section 21(2) treatment and unlikely to be accepted as in the public interest by the RPC. However, this assumption is not entirely correct since the RPC has accepted a major system run by a very powerful association.

(ii) Under Section 21(2) RTPA 1976

As a general rule trade association exclusive dealing will not be suitable for Section 21(2) treatment since the restrictions may not be said to be insignificant. Thus in South West Herts Coach Operators Association²⁴ the OFT gave Section 21(2) dispensation to an association's membership conditions only after a clause which provided that inter-hire would take place "within the Association whenever possible unless an emergency occurs" was deleted.

(iii) Position of the RPC

Whilst it remains true to say that trade association exclusive dealing will rarely be in the public interest it is also true that such systems may be acceptable in exceptional cases. In ABTA²⁵ the RPC was required to assess against the public interest a scheme operated by ABTA where tour operator members could only deal with travel agent members and vice versa i.e. members could only deal with members. ABTA consists of about 2,400 members divided into two broad categories: tour operators and retail agents (travel agents). ABTA's dominance over the industry was almost complete, membership was viewed as a license to trade. The RPC commented, "... exclusion from A.B.T.A. in its present form if it does not amount to a denial of such a license is at the very least a severe handicap."²⁶ The exclusive dealing provisions derived from the associations articles of association which prohibited members from dealing with non-members. This was subject to a few limited exceptions. This provision was labelled the "stabilizer" by the association. Despite the objections of counsel for the OFT, the RPC accepted that "stabiliser" was in the public interest. To belong to ABTA applicants had to satisfy certain financial criteria which had been imposed as a

result of the collapse of certain travel companies which had caused great inconvenience to travellers and which has received considerable adverse publicity. Furthermore, members had to comply with a code of conduct which was also designed to maintain standards. The RPC stated:

"In order to survive, stabilizer, too, has to fulfil the conditions of one of the gateways in Section 19(1) of the Act of 1976. We are satisfied that it does so. The financial safeguards, whether considered in conjunction with the other arrangements and operations such as the codes of conduct stripped of their vices, and the many non-restrictive benefits referred to in this judgment, or whether considered in isolation, are important, specific and substantial benefits to the purchasers and would-be purchasers of foreign inclusive tours, stabilizer ensures that the safeguards are contributed to by a wide membership and that A.B.T.A.'s requirements are adhered to. If stabilizer were to be removed, the compulsive force of this sanction would decline and the benefits of the safeguards would be lost. So the financial safeguards result from the maintenance of the stabilizer restrictions. The conditions of Section 19(1)(b) of the Restrictive Trade Practices Act 1976 are accordingly satisfied."²⁷

It is notable that the RPC indicated that although "stabilizer" was in the public interest it could nonetheless be improved by incorporating a more flexible set of exceptions into it.²⁸ Under the articles of association ABTA could exempt members from the restrictions on dealing with traders outside of the association. The RPC considered that, hitherto, ABTA had granted dispensation in an arbitrary manner.²⁹ However, the RPC refused to lay down strict guidelines for ABTA to apply. Instead the Court stressed that: (a) dispensation should not be granted in an arbitrary manner; and (b) ABTA should employ criteria relating to the consumer's interest only, for that was the paramount consideration justifying stabilizer in the public interest.³⁰ Thus, ABTA should not act as a "recruiting sergeant" refusing dispensation simply because ABTA wished to maintain its membership numbers.³¹

Following ABTA trade association exclusive dealing may be in the public interest where membership to the association confers benefits on the consuming public. Probably, there must exist exceptional circumstances (for instance the need to provide financial security for the public) before the restrictions will be acceptable. It should be added that simply because the RPC might accept a closed system does not imply that such systems are suitable for Section 21(2) treatment. It will almost certainly be the case that even the most meritorious of

schemes will have to justify themselves before the RPC.

E. GUILT BY MEMBERSHIP

Members of an association which infringes competition rules run the risk of being implicated in the associations unlawful activities by mere fact of membership. In one American case the Court commented that membership per se was not evidence of collusion but they added:

"Thus, the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to disassociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise"³²

"Guilt by membership" is an important issue in EEC law where the fines that may be imposed may be very considerable in extent. It is perhaps less pressing in UK law though members of associations subject to Court orders or injunctions may risk being in contempt of court if they become implicated in association conduct that infringes a Court order. Contempt of court is punishable by gaol and/or fines.

I. EEC Law

(i) Basic principle

According to the European Court in FEDETAB³³ a member of an association may be liable for concerted practices with other members where the association rules provide that its decisions shall be binding on members. In such a case a member may be liable even though it did not specifically agree to follow such decisions where it does in fact comply with those decisions. The fact that the member asserts that its behaviour was due to compelling market forces rather than the decision is immaterial (or perhaps more accurately contrary to the reasonable implications to be drawn from the fact of the members compliance).

In FEDETAB the Court made the additional comment that the association acted in the name of its members who "... took part in the adoption and observance of the said measure through the intermediary of their trade association".³⁴ Precisely what relevance is to be accorded this dictum is unclear. It is unlikely that mere innocent membership would suffice to raise an implication to involvement.

However, if a member either takes part in the adoption of a measure or complies with it subsequent to its adoption then this apparently will imply involvement.

(ii) Fines³⁵

In determining whether to impose fines and, if so, the amount, the Commission may consider, inter alia, the extent of participation in the infringement. The different roles of members and their respective degrees of complicity should be reflected in the fine. Hence, a member whose complicity is primarily through membership rather than through active involvement should receive a lesser fine than a member who actively participated in the infringement.³⁶

(iii) Practical Considerations

Given that the threat of fines is not a remote one members may wish to take steps to minimise the risks of guilt by membership. To this end members might consider departing any association meeting or discussion at which conduct they consider is likely to infringe competition rules is at stake. Departure from the meeting might be accompanied by a statement that the member is departing as a result of the nature of the discussions in question. Where such a statement can be minuted it may help to disassociate the member from any subsequent unlawful behaviour. Advice of this nature is commonly given in the U.S.A. It would appear to be relevant also under EEC rules.

II. United Kingdom Law

UK Competition law does not impose the same threat of financial sanction that EEC law does. Situations in which guilt by membership may pose serious problems are hence more limited. Where an association enters an agreement that is registrable under the RTPA 1976 then it may be subject to a prohibitive court order. However, in such cases it will primarily be the association, and not the members, which must appear before the Court. Moreover, the Court has no power to impose fines. However, "guilt by membership" may be a problem for a firm who becomes or is a member of an association subject to a Court order. Under Section 2 RTPA 1976 the RPC may make an order against, inter alia, "the persons party to the agreement who carry on business within the United Kingdom". Members of associations are, by virtue of Sections 8 (goods) and 16 (services) RTPA 1976, deemed to be parties to agreements made by a trade association and to accept

recommendations made by the association. Thus, members of associations are subject to Court orders. Breach of such an order is contempt of court which is punishable by gaol or fine. The OFT have, in recent years, adopted an increasingly strict attitude towards alleged contempt cases and a number have been brought to trial. Thus, members of associations should ensure that their conduct does not infringe any outstanding Court orders. If they find that it does they should take immediate steps to disassociate themselves from the conduct and have their opposition formally recorded. See Chapter 5 Section E for further discussion on contempt cases.

FOOTNOTES

1. See Martin Peters GmbH (Case 34/82) [1984] 2 C.M.L.R. 605 in respect of Article 5(1) of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (27 Sept. 1968).
2. BRT v. SABAM (Case 127/73) [1974] 2 C.M.L.R. 238; [1974] E.C.R. 313 at para. 11 of judgment. See also per Advocate General Mayras at [1974] E.C.R. 313 at p. 325: "... an undertaking occupying a dominant position is prohibited from exceeding a limit of fairness, and the measures which it chooses to attain its object must be the least restrictive possible".
3. See e.g. the U.S. decision in Associated Press v. U.S. 326 U.S. 1 (1945), see also U.S. v. Allied Florists Association of Illinois (1952-53) Trade Cases para. 67,433 at 68, 170 (N.D. Illinois 1953); and U.S. v. Republic Steel Corp. (1952-53) Trade Cases para. 67, 510 at 68, 497 (N.D. Ohio 1953).
4. Germany v. Commission (Cases 52 and 55/65) [1967] C.M.L.R. 22, [1966] E.C.R. 159. Such fees cannot be justified under Article 36 EEC: Marimex v. Italian Tax Administration (Case 29/72) [1973] C.M.L.R. 486, [1972] E.C.R. 1309, but c.f. Bauhuis v. the Netherlands (Case 46/76) [1977] E.C.R. 5.
5. e.g. Commission v. Italy (Case 24/68) [1971] C.M.L.R. 611; [1969] E.C.R. 193.
6. e.g. Rewe-Zentralfinanz v. Landwirtschaftskammer (Case 39/73) [1977] 1 C.M.L.R. 630 [1973] E.C.R. 1039; Simmenthal v. Italian Minister of Finance (Case 35/76) [1977] 2 C.M.L.R. 1, [1976] E.C.R. 1871.
7. Rewe-Zentralfinanz (supra) at [1973] E.C.R. 1039 at p. 1044.
8. See Apple and Pear Development Council v. Lewis (Case 222/82) [1983] E.C.R. 4083, but c.f. Cadskey v. Istituto Nazionale per il Commercio Estero (Case 63/74) [1975] 2 C.M.L.R. 246, [1975] E.C.R. 281.
9. Sections 6(4) and 17(2) RTPA 1976 respectively.
10. e.g. FEDETAB (Cases 209-215, 218/78) [1981] 3 C.M.L.R. 134, [1980] E.C.R. 3125 at paras. 85-89 of the judgment.
11. Stoves and Heaters [1975] 2 C.M.L.R. D1 at D9 paras. 36-38. See also Donck [1978] 2 C.M.L.R. 194; Gas Water Heaters [1973] C.M.L.R. 231.
12. For an early exposition of this principle see Convention Faience Bull E.C. 5/64 at p. 53 et. seq. See also Krups [1980] 3 C.M.L.R. 274 in respect of dealership associations run by a single supplier.
13. c.f. Belgian Central Heating Association [1972] C.M.L.R. D130.
14. e.g. GEMA [1972] C.M.L.R. D115; and BRT v. SABAM (case 127/73) [1974] 2 C.M.L.R. 238, [1974] E.C.R. 313; c.f. also Greenwich Films v. SACEM [1982] 1 C.M.L.R. 577 (French Cour de Cassation).
15. Van Luipen (Case 29/82) [1983] 2 C.M.L.R. 681, [1983] E.C.R. 151 at para. 9 of the judgment; Vriend (Case 94/79) [1980] 3 C.M.L.R. 473, [1980] E.C.R. 327.

16. Van der Haar (Case 11/84) [1985] 2 C.M.L.R. 566 Court held that Article 30 not subject to a de minimis rule.
17. [1984] I.C.R. 12.
18. *ibid.*, at p. 19D.
19. *ibid.*, at p. 42H.
20. *ibid.*, at p. 44A.
21. e.g. Convention Faience Bull E.C. 5/64 at p. 53; VCH [1973] C.M.L.R. D16; GISA [1973] C.M.L.R. D125; Bomée - Stichting [1976] 1 C.M.L.R. D1; ASPA [1970] C.M.L.R. D25; FEDETAB [1978] 3 C.M.L.R. 524 (Commission decision), VBBB & VBVB [1982] 2 C.M.L.R. 344 at paras. 39, 40 (Commission decision).
22. e.g. Bomée - Stichting [1976] 1 C.M.L.R. D1 at D6 para. 23: "The effect of these restrictions is to consolidate existing distribution structures and the positions of the undertakings concerned on the relevant markets in such a way that new market entrants and firms which refuse to accept the Bomée conditions ... find it difficult to penetrate the market. The Bomée system makes it particularly difficult for market positions to be modified by the free play of competition."
23. See e.g. Salonia v. Poidomani (Case 126/80) [1982] 1 C.M.L.R. 64.
24. No. S.292 Register of Restrictive Trade Practices (1977). See also, No. S.598 Register of Restrictive Trade Practices, Pontefract and Castleford Transport Association (1980).
25. [1984] I.C.R. 12.
26. *ibid.*, at p. 17G.
27. *ibid.*, at p. 46C, D.
28. ABTA (No. 2) [1985] I.C.R. 122 at pp. 130, 131
29. [1984] I.C.R. 12 at p. 47E, -G.
30. [1985] I.C.R. 122 at p. 131A, B.
31. *ibid.*, at p. 131C.
32. Phelps Dodge Refining Corp. v. F.T.C. 139 F. 2d 393 (2d Cir. 1943). See also Boyle v. U.S. 40 F. 2d 49 at p. 51 (7th Cir. 1930).
33. (Cases 209-215, 218/78) [1981] 3 C.M.L.R. 134, [1980] E.C.R. 3125 at paras. 90, 91 of the judgment.
34. *ibid.*, at para. 91.
35. See Kerse, EEC Antitrust Procedure (1981) at pp. 171-176 and supplement (1984) at pp. 41, 42.
36. See e.g. the position of Firma Schiffer in Floral [1980] 2 C.M.L.R. 285 at p. 301 para. 77.

TABLE A

TOTAL FIGURES
(GOODS AND SERVICES)

DATE	NO. OF AGREEMENTS REGISTERED	NO. OF AGREEMENTS TERMINATED OR RESTRICTIONS FILED BY PARTIES	DGFT REPRESENTATIONS SINCE 1956		S. of S. DIRECTIONS GIVEN IN THAT YEAR	TOTAL NO. OF COURT CASES SINCE 1956
			S. of S. DIRECTIONS SINCE 1956			
1972	2875	2620	NA	NA	NA	400
1973-4	2990	2684	NA		47	410
			NA			
1975	3100	2788	173		18	414
			NA			
1976	3252	2800	181		7	414
			180			
1977	3526	at least 2892	at least 190		19	474
			at least 187			
1978	3999	at least 3089	at least 205		31	489
			at least 202			
1979	4245	at least 3193	at least 229		68	659
			at least 224			
1980	4368	3295	345		38	663
			335			
1981	4626	3360	396		49	663
			384			
1982	4780	3415	429		29	663
			414			
1983	4978	3541	454		27	666
			440			
			544			

TABLE B

GOODS AGREEMENTS

DATE	TOTAL NO. REGISTERED SINCE 1956	NO. TERMINATED WHETHER BY VIRTUE OF A COURT ORDER OR BY ACTION OF THE PARTIES (TERMINATION OR FILELTING) OR OTHERWISE SINCE 1956	NO. TERMINATED SINCE 1956	NO. FILELETED SINCE 1956	TOTAL NO. S.12 RTPA 1956; OR S.21(2) RTPA 1976 DGFT REPRESENTATIONS	S. of S. DIRECTIONS IN THAT YEAR	CASES STILL UNDER NEGOTIATION	CASES ACTUAL HEARD AND FINISHED	TOTAL NO. OF COURT CASES SINCE 1956
June 1972	2875	2620	NA	NA	NA	NA	NA	400	
1973-4	2990	2684	NA	NA	NA	47	410		
1975	3100	2788	NA	NA	173 1	18	414		
1976	3150	2800	NA	NA	181	7	414		
1977	3320	2892	NA	NA	180	90	403 2		
1978	3678	3089	NA	NA	190	7	474		
1979	3810	3193	NA	NA	187	100	407		
1980	3873	3211	NA	NA	205	15	487		
1981	3940	3231	NA	NA	202	130	4073		
1982	4005	3258	NA	NA	229 4	50	657		
1983	4132	3269	NA	NA	224	140	6395		
			NA	NA	276	16	658		
			NA	NA	269	160	641		
			2185	310	33	658			
			1046	302	162	647			
			2205	323	11	658			
			1053	314	145	448			
			2212	336	14	660			
			1057	327	NA	648			

TABLE C

SERVICES AGREEMENTS

DATE	TOTAL NO. OF AGREEMENTS FURNISHED TO O.F.T. FOR CONSIDERATION SINCE 1976	NO. OF AGREEMENTS UNDER CONSIDERATION BY O.F.T. DURING YEAR	TOTAL NO. OF AGREEMENTS ACTUALLY REGISTERED SINCE 1976	TOTAL NO. OF AGREEMENTS SINCE 1976 TERMINATED BY PARTIES	TOTAL NO. OF AGREEMENTS SINCE 1976 IN WHICH ALL RESTRICTIVE CLAUSES HAVE BEEN FILLETED	USE OF S. 21(2) PROCEDURE SINCE 1976: DGT REPRESENTATIONS	S. of S. DIRECTIONS GIVEN IN THAT YEAR	TOTAL NO. OF COURT CASES
1976	584 ¹	NA	102	NA	NA	NA NA	NA NA	0
1977	630 ²	NA	205	NA	NA	NA NA	12 563	0
1978	NA	298	321	NA	NA	NA NA	16 NA	1
1979	NA	363	435	NA	NA	NA NA	17 NA	AT LEAST 24
1980	NA	250	495	55	32	69 66	22 NA	5
1981	NA	464 ⁵	686	94	35	86 82	16 NA	56
1982	NA	445	775	118	39	106 100	18 NA	5
1983	NA	NA	846	230	42	118 113	13 NA	67
1984	NA	NA	984	286	50	167 144	32 NA	7

FOOTNOTES

TABLE A

1. Figures expressed to be 'at least' are minimum figures which, due to lack of data, exclude totals for services.

TABLE B

1. 32 representations made to S. of S. during period 1973-75.
2. Of the undisposed of cases almost all were either terminated by the parties or expired for effluxion of contract time.
3. Of the 80 outstanding cases 60 related to agreements between manufacturers of ready mix concrete and 18 related to diazo copying materials.
4. 229 however related to 257 agreements.
5. Of the 18 outstanding cases 9 related to ready mix concrete agreements and in 5 the relevant agreements were terminated. 172 prohibitive court orders had been made as of this date in respect of ready mix concrete.

TABLE C

1. Though the O.F.T. dealt with approximately 600 enquiries during the period from the commencement into operation of Restrictive Trade Practices (Services) Order 1976 (SI 1976 No. 98) calling up services agreements for registration.
2. c.f. The Director General of Fair Trading Annual Report (1977) at p. 35 which states: "A high proportion of the agreements submitted are proving not to be registrable (about a third of those so far analysed) and it seems possible that this may be true of as many as half of the total submissions. This is possibly because of the complications of the legislation in its application to services agreements, but mainly because parties were urged in appropriate cases to make use of a 'fair safe' procedure whereby they could supply particulars of agreements for consideration rather than risk the consequences of default if the agreement later proved to be registrable."
3. Though 150 agreements were actually actively considered for representation.
4. Various parties had commenced proceedings under S.26 R.T.P.A. for declarations that their restrictions were non-registrable.
5. Proceedings related to: Aerodrome Owners Association agreement, the Association of British Travel Agents; The Stock Exchange; and two agreements relating to the Society of West End Theatres.
6. Over 200 of the cases being considered by the O.F.T. related to either standard form franchise agreements or standard form agreements relating to the broadcasting of sports events.