COMMISSION REGULATION (EEC) No 3604/82

of 23 December 1982

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 87 thereof,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices [1], as amended by Regulation (EEC) No 2743/72 [2] and by the Acts concerning the conditions of accession and the adjustments to the Treaties of 1979 [3], and in particular Article 1 thereof,

Having published the draft of this Regulation,

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

1. Whereas Regulation (EEC) No 2821/71 empowers the Commission to apply Article 85 (3) of the Treaty by Regulation to certain categories of agreements, decisions and concerted practices concerning specialization, including agreements necessary for achieving it, which fall within Article 85 (1);

2. Whereas agreements for the specialization of present or future production may fall within the prohibition contained in Article 85 (1);

3. Whereas agreements for the specialization of production lead in general to an improvement in the production or distribution of goods, because the undertakings can concentrate on the manufacture of certain products, thus operate on a more rational basis and offer these products at more favourable prices; whereas it is to be anticipated that, with effective competition, consumers will receive a fair share of the profit resulting therefrom;

4. Whereas these advantages arise in the same way out of agreements whereby each participant gives up manufacture of certain products in favour of another as out of agreements whereby participants undertake to only manufacture or have manufactured certain products jointly;

5. Whereas this Regulation must determine what restrictions on competition may be included in a specialization agreement; whereas the restrictions on competition, going beyond reciprocal giving up of manufacture, which are thus permitted are normally essential for the entering into, and implementation of, the agreement; whereas these restrictions are therefore, in general, indispensable for the purpose of ensuring that the desired benefits accrue to undertakings and consumers; whereas it may be left to the contracting parties to decide which of these provisions they include in their agreements;

6. Whereas, in order to ensure that competition is not eliminated in respect of a substantial part of the goods in question, this Regulation applies only if the share of the market held by the participating undertakings and the size of the undertakings themselves do not exceed a specified limit;

7. Whereas, in order to facilitate the conclusion of long-term specialization agreements, which can have an impact on the structure of the participating undertakings, it is appropriate to fix the period of validity of the Regulation at 15 years; whereas, if the circumstances on the basis of which this Regulation was adopted should change within this period, the Commission will undertake the necessary amendments;

8. Whereas agreements, decisions and concerted practices which satisfy the conditions set out in this Regulation need not be notified; whereas an undertaking may nonetheless in a particular case, where justified doubt exists, require the Commission to declare whether its agreements comply with this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

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 any agreement whereby, with the object of specialization and for the duration of the agreement, undertakings mutually undertake either:

(a) not to manufacture themselves, or to have manufactured by other undertakings, certain products

[1] OJ No L 285, 29. 12. 1971, p. 46.
[2] OJ No L 291, 28. 2. 1972, p. 144.
[3] OJ No L 291, 19. 11. 1979, p. 94.

and to leave to other contracting parties the task of manufacturing, or of having manufactured, such products ; or

(b) to only manufacture or have manufactured certain products jointly.

Article 2

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

(a) the obligation not to conclude with other undertakings specialization agreements relating to identical products or to products considered by users to be similar by reason of their characteristics, price or use, except with the consent of the other contracting parties ;

(b) the obligation to supply the other contracting parties with the products which are the subject of specialization, and in so doing to observe minimum standards of quality ;

(c) the obligation to purchase products, which are the subject of specialization, solely from another contracting party or from an undertaking which the contracting parties jointly charged with the manufacture, except where more favourable terms of purchase are available elsewhere and the other contracting party, or the undertaking charged with manufacture, are not prepared to offer the same terms ;

(d) the obligation to grant to other contracting parties the exclusive right to distribute the products which are the subject of specialization provided that intermediaries and users can also obtain these products from other suppliers and that the contracting parties do not render it difficult for intermediaries or users to thus obtain the products.

2. Article 1 shall apply notwithstanding that the following obligations are imposed :

(a) the obligation to maintain minimum stocks of the products which are the subject of the specialization and of replacement parts for them ;

(b) the obligation to provide customer and guarantee services for the products which are the subject of the specialization.

Article 3

Article 1 shall apply only :

(a) if the products which are the subject of the specialization and other products of the participating undertakings considered by users to be similar by reason of their characteristics, price or use do not represent, in a substantial part of the common market, more than 15 % of the market for all such products ; and

(b) if the total annual turnover of the participating undertakings does not exceed 300 million ECU.

Article 4

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

2. Article 1 of this Regulation shall remain applicable where during any period of two consecutive financial years the share of the market or the turnover referred to in Article 3 is exceeded by no more than 10 %.

3. For the purpose of calculating total annual turnover within the meaning of Article 3 (b), the turnovers achieved during the last financial year by the participating undertakings in respect of all goods and services excluding all taxes and duties shall be added together. In this connection, no account shall be taken of dealings between the participating undertakings or between these undertakings and the undertaking charged with manufacture.

Article 5

For the purposes of Articles 3 (1) (a) and (b) and 4 (3), participating undertakings are :

(a) the undertakings party to the agreement ;

(b) undertakings in which a party to the agreement, directly or indirectly :

— owns more than half the capital or business assets, or

— has more than half the voting rights, or

— is able to appoint at least half the members of the supervisory board, board of management or bodies legally representing the undertaking, or

— is able to manage the affairs ;

(c) undertakings which directly or indirectly have in or over the undertakings party to the agreement, the rights or powers listed in (b) ;

(d) undertakings in which an undertaking referred to in (c) directly or indirectly has the rights or powers listed in (b).

Article 6

The Commission may withdraw the benefit of this Regulation pursuant to Article 7 of Regulation (EEC) No 2821/71 when it finds in a particular case that an agreement exempted by this Regulation nevertheless has effects which are incompatible with the conditions set out in Article 85 (3) of the Treaty and in particular where the specialization is not yielding significant results or that consumers are not receiving a fair share of the resulting profit.

Article 7

This Regulation shall apply by analogy to the categories of decisions of associations of undertakings and concerted practices defined in Article 1.

Article 8

This Regulation shall enter into force on 1 January 1983.

It shall apply until 31 December 1997.

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

Done at Brussels, 23 December 1982.

For the Commission

Frans ANDRIESSEN

Member of the Commission