

World Law of Competition

UNIT B—WESTERN EUROPE

1

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DECEMBER 1982 CUMULATIVE SUPPLEMENT

Julian O. von Kalinowski
General Editor

**WORLD LAW
OF COMPETITION**

**Unit B
WESTERN EUROPE
Volume B1
EUROPEAN ECONOMIC COMMUNITY**

**by
Ivo Van Bael
and
Jean-François Bellis**



**MATTHEW
BENDER**

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CHAPTER 1

Introduction

§ 1.03 The Jurisdictional Scope of EEC Competition Law— Extraterritorial Application of EEC Competition Rules

PAGE EEC 1-5:

[Amend N. 1 by adding the following:]

On this matter generally see the Commission's comments on the "application of the competition rules to non-Community undertakings" in *Eleventh Report on Competition Policy*, Nos. 34-42.

E6

CHAPTER 2

Special Sectors

§ 2.01 Special Sectors

[3]—Transport

[c]—Sea and Air Transport

PAGE EEC 2–27:

[Omit the last four lines in N. 76 and replace with the following text:]

applied only to those agreements and decisions which the authorities of the Member States, acting under Article 88 of the Treaty, have expressly declared to come within Article 85(1) and to be ineligible for exemption under Article 85(3), or to those agreements which the Commission, by decision under Article 89(2), has held to be contrary to Article 85.

PAGE EEC 2–28:

[Replace the first paragraph by the following text:]

In 1981, the Commission transmitted two proposals for regulations to the Council concerning the application for Articles 85 and 86 to air and sea transport respectively.⁷⁹

[Omit N. 79 and insert the following text instead:]

⁷⁹ Appendices 2C and 2D. On these proposals see *Eleventh Report on Competition Policy*, 19–22. See also “Air Transport: a Community approach”, Memorandum of the Commission, Annex 1 to Suppl. 5/79, Bull. E.C.

[4]—Agriculture**PAGE EEC 2-31:**

[Add the following to N. 80:]

On this matter see *Breeders' rights—maize seed*, Commission Decision of September 21, 1978, (1978) O.J. L 286/23, (on appeal, Case 258/78, *Nungesser v. Commission*), (1982) E.C.R. — (seeds held to fall within the scope of application of Regulation No. 26); *Rennet*, Commission Decision of December 5, 1979, (1980) O.J. L 51/19 (on appeal Case 61/80 *Coop. Stremsel- en Kleurselfabriek v. Commission*, (1981) E.C.R. 851) (rennet and colouring agents for cheese held to be outside the scope of application of Regulation No. 26).

PAGE EEC 2-32:

[Omit lines 2-5 in N. 83.]

PAGE EEC 2-33:

[Add the following to N. 86:]

See also *Breeders' rights—maize seed*, N. 80 *supra* (agreements for the marketing of seeds held not to come within the exemption provided for by Article 2 of Regulation No. 26 on the ground that (1) the agreements do not form part of a national market organization, and (2) they are not necessary for the attainment of the objectives set out in Article 39); *Cane Sugar Supply Agreement*, Commission Decision of December 7, 1979, (1980) O.J. L 39/64 (contracts for the supply to the United Kingdom of raw cane sugar produced in overseas countries and territories held to be in line with the objectives both of Article 39 and of the Community's development policy on the ground that they assist developing countries to maintain their traditional European markets, that they provide security of supply to Community refineries specialized in refining raw cane sugar and that they bring a significant degree of outside competition to the Community market).

PAGE EEC 2-34:

[In fourth line from bottom in N. 88 omit "Article 1" and replace by "Article 2(1)".]

CHAPTER 3

Article 85 / Concerted Action Restricting Competition

§ 3.02 Jurisdictional Elements

[2]—"Undertaking" Defined

[a]—Generally

PAGE EEC 3-7:

[Omit the first three lines and insert the following instead:]

associations, corporations, cooperatives⁶ as well as professional firms.^{6B}

[Omit the first sentence in N. 6 and insert the following instead:]

See *Rennet*, Commission Decision of December 5, 1979, (1980) O.J. L 51/19 (upheld on appeal Case 61/80 *Coop. Stremsel-en Kleurselffabriek v. Commission*, (1981) E.C.R. 851 (dairy cooperatives held to be undertakings).

[Add the following note 6B:]

^{6B} See *Italian cast glass*, Commission Decision of December 17, 1980, (1980) O.J. L 383/19, at 23 (professional accountant firm, which had been actively involved in the monitoring of a market-sharing arrangement among glass manufacturers, held to be an undertaking).

**[c]—Public Undertakings—Undertakings to Which
Member States Grant Special or Exclusive Rights**

PAGE EEC 3-10:

[Amend N. 15 by adding the following text:]

See also *Züchner v. Bayerische Vereinsbank*, (1981) E.C.R. 2021, para. 7 (rôle of banks in international movements of capital held not to be sufficient to subject banks to Article 90(2)); *GVL*, Commission Decision of October 29, 1981, (1981) O.J. L. 370/49, No. 66 (grant by a public authority of an authorization to operate held not to be sufficient to bring the company concerned under Article 90(2) as the latter requires that "specific responsibilities and hence specific obligations are officially conferred upon an undertaking").

In *Sterling Airways, Tenth Report on Competition Policy*, No. 138, the Commission stated that the grant to an airline of the right to transport passengers on certain routes is a "special or exclusive right" within the sense of Article 90(2).

[3]—Activities Included in the Word "Trade"

PAGE EEC 3-19:

[Omit the last line in N. 22.]

[4]—Effect on Trade Between Member States

PAGE EEC 3-20:

[Add to the third paragraph in N. 23 the following:]

On January 1, 1981 Greece joined the Community.

PAGE EEC 3-22:

[Add to N. 25 the following text:]

In *Miller v. Commission*, (1979) ECR 131 at 151, the Court made it clear that "(i)n prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition Article 85(1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect" (at para. 15).

On this matter see also *Salonia v. Poidomani*, (1981) E.C.R. 1563, at paras. 14-19 (reciprocal exclusive distribution agreements for the supply of Italian newspapers in Italy between Italian parties may affect trade between Member States only in so far as they may "have repercussions on the distribution of newspapers and periodicals from other Member States"); *Züchner v. Bayerische Vereinsbank*, (1981) E.C.R. 2021, at para. 18 (bank charge on transfers abroad held to be capable, "precisely because of the fact that it covers international transactions, of affecting trade between Member States").

PAGE EEC 3-23:

[Add to N. 30 the following text:]

BP Kemi-DDSF, Commission Decision of September 5, 1979, (1979) O.J. L 286/32; *Rennet*, N. 6 *supra* (exclusive purchasing arrangements); *Italian cast glass*, N. 6 *supra* (market-sharing agreement).

PAGE EEC 3-27:

[Add the following to N. 36:]

For a more recent example of application of Article 85 to a national price-fixing agreement see *FEDETAB*, Commission Decision of July 30, 1978, (1978) O.J. L 224/29, upheld on appeal in Cases 209-215 and 218/78, (1980) ECR 3125 (agreement on intermediaries' margins and payment terms between Belgian cigarette manufacturers accounting for over 90% of cigarette sales in Belgium held to affect inter-State trade on the ground that the parties to the agreement imported a significant proportion of cigarettes and cigars introduced into Belgium from other Member States).

PAGE EEC 3-28:

[Add the following to N. 37:]

For other examples of the application of Article 85 to intra-State agreements see, e.g., *Vaessen-Morris*, Commission Decision of January 10, 1979, (1980) O.J. L 19/32 (no-challenge and exclusive purchase provisions in a license agreement between two Belgian companies held to affect inter-State trade on the ground that the abovementioned provisions make penetration of the Belgian market by firms from another Member State more difficult).

[5]—Trade With Third Countries**[a]—Generally****PAGE EEC 3-28:**

[Omit N. 40 and insert the following instead:]

N. 40 On the extra-territorial reach of EEC competition rules generally, see Chapter 1 *supra*.

§ 3.03 Substantive Elements**[2]—Agreement; Decision by an Association of Undertakings; Concerted Practice****[b]—Plurality of Actors**

[ii]—The Undertaking and its Employees or Agents

PAGE EEC 3-38:

[Amend N. 9 by omitting the words in brackets: “(on appeal . . . not yet decided)”.]

[c]—Agreement, Decision and Concerted Practice Defined

[iii]—Concerted Practice

PAGE EEC 3-53:

[Amend N. 33 by omitting the last line in p. EEC 3-53 and adding the following text at the end of the note:]

For other examples of concerted practices, see *BP Kemi-DDSF*, Commission Decision of September 5, 1979, (1980) O.J. L 286/32 at 40 (charging of identical prices to individual customers by two companies held to be strong evidence of a concerted practice when it is unlikely to occur in the normal conditions of the market and particularly when the companies concerned were previously bound by an express price stipulation and when they regularly exchange detailed information concerning quantities sold to individual customers) and *Pioneer Hi-Fi Equipment*, Commission Decision of December 14, 1979 (1980) O.J. L 60/21 (on appeal, cases 100-103/80, *MDF and others v. Commission*) (alleged refusal to supply and issuance of letters exhorting cus-

tomers not to export held to be the result of a concerted practice designed to interfere with parallel imports between Pioneer and its French, British and German distributors on the ground that these alleged actions were engaged in after the distributors concerned had participated in a meeting organized by Pioneer in which parallel exports were discussed). See also *Züchner v. Bayerische Vereinsbank*, (1981) E.C.R. 2021 (arrangements between banks).

[3]—Which Have as their Object or Effect the Prevention, Restriction or Distortion of Competition Within the Common Market

[b]—Restriction of Competition

PAGE EEC 3-57:

[At the end of the first paragraph add the following sentence:]

Thus, for instance, the Commission has ruled that an agreement between manufacturers, which had set up a scheme of production quotas, and a professional accountant firm, entrusted with the monitoring of the illegal scheme, constituted an illegal agreement under Article 85(1).^{42A}

^{42A} *Italian cast glass*, Commission Decision of December 17, 1980, (1980) O.J. L 383/19.

[Add the following note in the last line of N. 42:]

; *Salonia/Poidomani*, (1981) E.C.R. 1563.

[d]—Meaning of “Appreciable”—The “De Minimis” Rule

PAGE EEC 3-61:

[In line 10 of N. 51 add after “¶ 8284” the following text:]

; *Langenscheidt/Hachette*, Commission Decision of November 17, 1981, (1982) O.J. L 39/25 (French-language courses for German-speaking market held to be a relevant market).

PAGE EEC 3-62:

[Add to N. 56 the following text:]

In *Miller v. Commission*, (1978) E.C.R. 131 at 150, a company accounting

for around 5% of the German market for sound recordings with sales of DM 34 million was held not to be comparable to the undertakings concerned *inter alia* in *Völk v. Vervaecke* and to be “an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade” (at para. 10).

§ 3.04 Exemption Under Article 85(3)

[1]—Introduction

PAGE EEC 3-73:

[In the item “Trade Fairs” in N. 21 add the following to case BPICA:]

; extended by Commission Decision of April 30, 1982, (1982) O.J. L 156/16.

PAGE EEC 3-74:

[In the item “Joint Ventures” in N. 21 add the following to case Vacuum Interrupters Ltd.:]

; extended by Commission Decision of December 11, 1980, (1980) O.J. L 383/1.

[In the item “Joint Ventures” in N. 21 add the following text:]

Langenscheidt/Hachette, Commission Decision of November 17, 1981, (1982) O.J. L 39/25.

PAGE EEC 3-75:

[In the last line of N. 21 add the following:]

; extended by Commission Decision of November 26, 1981, (1981) O.J. L 391/1.

PAGE EEC 3-75:

[Add to the fifth line the following text and note:]

In view of the serious difficulties experienced by certain European industries, the Commission has had to examine the conditions under which a “crisis cartel” can qualify for an exemption under Article 85(3).²³⁸

²³⁸ On this matter see § 3.04[2][d] and Chapter 12 *infra*.

[Add to N. 24 the following text:]

; extended by Commission Decision of December 12, 1979, (1980) O.J. L 39/73.

[2]—Conditions for Exemption Under Article 85(3)

[b]—Second Condition: Benefits for Consumers

PAGE EEC 3-81:

[At the end of the first paragraph add the following text and note:]

In certain cases the Commission has also referred to the sophistication and bargaining strength of the buyers as factors likely to ensure that a fair share of the benefit is passed to the user.^{52B}

^{52B} See *Vacuum Interrupters Ltd.*, N. 21 *supra*.

[d]—Fourth Condition: No Elimination of Competition

PAGE EEC 3-83:

[Add to N. 60 the following text:]

; *Italian cast glass*, Commission Decision of December 17, 1980, (1980) O.J. L 383/19 (joint market share of 50% of Italian market, together with other factors, held to bar exemption)."

PAGE EEC 3-84:

[In last line of text, delete N. 66 and replace N. 67 by N. 66:]

PAGE EEC 3-85:

[At the end of subsection [2] insert the following paragraph and note:]

As a result of the notification of the "crisis cartel" for man-made fibres, the Commission has examined the conditions under which "crisis cartels" can be made compatible with Article 85(3) and, more specifically, with the condition that there be no elimination of competition. The Commission has concluded

that an agreement which merely reduces excess production capacity can be exempted under Article 85(3) provided that it is not accompanied by price fixing, production or sales quotas.⁶⁷

⁶⁷ *Eleventh Report on Competition Policy*, Nos. 46-48. See also Chapter 12 *infra*.

[3]—Duration of Exemption

[c]—Period of Exemption; Renewal

PAGE EEC 3-88:

[At the end of the third paragraph, delete "85" and add the following text:]

The Commission has shown a tendency of renewing existing exemptions for periods of 10 years.⁸⁵

[Add to N. 85 the following text:]

EMO/CECIMO, renewal, Commission Decision of December 7, 1978 (1979) O.J. L 11/16; *Vacuum Interrupters Ltd.*, N. 21 *supra*; *Sopelem-Vickers*, N. 21 *supra*.

[4]—Conditions Imposed by the Commission

PAGE EEC 3-92:

[Add the following text and note:]

- (7) An obligation to inform the Commission of any authorization to carry on other business granted by parties to a joint venture.⁹⁶

⁹⁶ *Vacuum Interrupters* (renewal), N. 21 *supra*.

§ 3.05 Defenses

[2]—State Action

PAGE EEC 3-94:

[Add to N. 6 the following text:]

A defense of state action was rejected on factual grounds by the Court in Cases 209-215 and 218/78, *Heintz van Landewijk and others v. Commission*, (1980) E.C.R. 3125.