

## CHAPTER TWELVE

### EC computer law

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#### 12.1 INTRODUCTION: 1992

A great deal has been written on the national aspects of computer law, but comparatively little is available on the European aspects of procuring, selling and distributing computers and computing equipment. Nonetheless, these aspects have become more and more important, particularly in the context of the EC's aim of establishing a Single Market by the end of 1992.

From the beginning of the 1980s, standardised rules were created for software protection, product liability and computer contracts, thereby eliminating the differences between the Member States' laws. These efforts seem to culminate in uniform EC computer law which will be able to fulfil the major aims of the EEC Treaty:

- (a) To abolish the proliferation of differences between national computer laws and nationalistic purchasing practices which act as disguised barriers to free trade (arts 30, 59-66 and 100).
- (b) Once the barriers to trade have been abolished to ensure free and open competition through the application of EC competition law (arts 85-94).
- (c) To support the development of a single internal market (art. 100(a)).
- (d) To promote a common commercial policy in the relations of the EEC to non-member States (art. 113).

These objectives were to be realised step by step following the publication of the Commission's White Paper in 1985.<sup>1</sup> In that paper, the EC Commission

1. For a more detailed discussion of this development see Corinna M. Wissels, 'European Community Law' in A. P. Meijboom and C. Prins (eds), *The Law of Information Technology in Europe 1992* (Deventer 1991), p. 3 et seq.

presented an extensive programme for the completion of the single internal market by 31 December 1992. The intention was that by that date, all restrictions on the free movement of goods, persons, services and capital within the European Community should be eliminated.<sup>2</sup>

This ambitious programme could only be realised with the aid of the Single European Act (SEA) which came into force on 1 July 1987.<sup>3</sup> The SEA amended the EEC Treaty. One of the major changes was to clear the log-jam of legislation on which agreement had not been reached in the Council of Ministers. The SEA achieved this by changing the voting rules so that more legislation could be enacted by a majority of Member States rather than by unanimity.<sup>4</sup>

As part of its 1992 initiative the EC authorities took a number of initiatives to harmonise computer law within Europe. Among the most important were:

- (a) The Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products issued on 25 July 1985.<sup>5</sup>
- (b) The Council Directive on the Protection of Semiconductor Product Designs issued on 16 December 1986.<sup>6</sup>
- (c) The Council Directive on Approximation of Trade Mark Laws.<sup>7</sup>
- (d) The Council Directive on the Legal Protection of Computer Programs adopted by the Council of Ministers on 14 May 1991.<sup>8</sup>
- (e) The proposal for a Council Directive Concerning the Protection of Individuals in Relation to the Processing of Personal Data submitted by the Commission on 27 July 1990.<sup>9</sup>
- (f) The proposal for a Council Directive on the Legal Protection of Databases announced on 29 January 1992.<sup>10</sup>

The 1992 programme is not only important for the EC Member States. It will also change the whole legal structure within the EFTA States, because on 2 May 1992 the EFTA States agreed with the EC to create a European Economic Area (EEA). On the basis of that agreement the EFTA States will

2. It is doubtful whether all parts of the Single Market programme will be implemented by 1 January 1993. As at 30 November 1991, 188 of the 282 Single Market measures had entered into force; only 108 of these measures had been implemented by all member States. See *The Single Market: Progress on Commission White Paper* (London: DTI, 1991).

3. Single European Act, OJ No. L 169, 1987.

4. See P. Pescatore, 'Some Critical Remarks on the Single European Act' 24 CML Rev 19; J. Lodge, 'The Single European Act: towards a New Euro-dynamism?' (1986) 24 *Journal of Common Market Studies* 203.

5. 83/374/EEC OJ No. L 210, 1985.

6. 87/54/EEC, OJ No. L 24, 27 January 1987, p. 36.

7. 89/104/EEC OJ No. L 40, 11 February 1989, p. 1.

8. 91/250/EEC OJ No. L 122, 17 May 1991, p. 42.

9. COM(90) 314 final - SYN 287, 90/C 277/03. OJ No. C 277, 5 November 1990, p. 12. This proposal has been published together with some other regulations on data protection especially with regard to the telecommunications sector.

10. COM(92) 24 final - SYN 393, OJ No. C 156, 23 June 1992, p. 4.

implement EC regulations into national law in the same way as EC Member States.

Before the 1992 programme of legislation, whether by design or for other reasons, Member States did not comply with their fundamental Treaty obligations. The basic rules contained in the Treaty therefore needed to be supplemented by regulations applying those rules in individual market sectors. The 1992 programme of legislation was created to achieve this aim. The fundamental Treaty rules are addressed briefly below. Where relevant the specific regulations are referred to, and other chapters of this book provide greater detail on the specific regulations. This chapter is primarily concerned with the following areas:

- (a) The free trade provisions of the EC Treaty and the obligations on governments and government bodies to purchase from any EC supplier.
- (b) The competition rules which apply to ensure that barriers to free trade are not re-erected by agreements between businesses, and which impose obligations on all concerned in the sale and distribution of computer products throughout the Community.

## 12.2 THE FREEDOM TO TRADE THROUGHOUT THE EUROPEAN COMMUNITY

Perhaps the most important amendments to national laws which govern the information technology industry, and which lead to a degree of harmonisation of those laws, derive from the EEC Treaty itself. As indicated above, arts 30 and 59 to 66 of the EEC Treaty abolished disguised barriers to free trade within the European Community.

The EEC Treaty established a customs union in which duties were eliminated between Member States and a common customs tariff was adopted in trade relations with non-EEC Member States. As a customs union, the free-movement provisions concerning both goods and services apply not only to goods originating within the Community, but also to products which have entered the Community from non-Member countries, once those products are in 'free circulation' within a single Member State. A substantial percentage of computer products or components are manufactured outside the Community. Once those products have lawfully<sup>11</sup> entered the Community, in their subsequent trade between Member States it is possible to rely on the free-movement provisions to the same extent as if those goods had originated within the Community.<sup>12</sup>

The origin of products may, however, be of significance if a Member State invokes art. 115 which may entitle it to prevent the free circulation of goods from another Member State. Substantial investment into the EEC from Far

11. EEC Treaty, art. 10, which requires import formalities to have been complied with and customs duties or charges having equivalent effect to have been levied without reimbursement of such duties or charges.

12. Regulation 802/68, OJ English Sp. Ed. 1968 (I), p. 15.

Eastern companies occurred during the 1980s and some of their products may be affected by these rules. The basic rule which defines the origin of goods is contained in Regulation 802/68. This provides that a product which is wholly obtained or produced in one country originates there. Goods produced in two or more countries are regarded as originating in the country where the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage in manufacture. (Particular legislation has been adopted under Regulation 802/68 for specific types of information technology products.)

In practice, a Community transit system has been introduced to facilitate internal Community transit and external Community transit (an exporter must make a 'T1' declaration for exports, whereas a 'T2' declaration is used for internal Community transit where the goods are in free circulation).

### 12.2.1 Measures which restrict the free movement of goods

Lifting the barriers to free trade may prompt a Member State to protect its national (domestic) industry. One mechanism for restricting the extent to which overseas competition may compete with domestic industry is to impose disguised restrictions on non-domestic goods. Such restrictions are abolished under art. 30 of the EEC Treaty. Article 30 has been interpreted very widely and any measure which affects trade in goods between Member States may fall within its prohibition. Measures such as labelling or origin-marking, differing product standards, import licences or 'buy national campaigns' can fall within art. 30. Directive 70/50/EEC<sup>13</sup> provides guidance on those measures which can be regarded as infringing art. 30. The European Court of Justice has widened the scope of art. 30 to encompass 'all trading rules enacted by Member States which are capable of injuring directly or indirectly, actually or potentially, intra-Community trade'.<sup>14</sup> It is of no consequence that the trading rules in question are applicable to both imports and products which have been produced domestically if the effect is to discriminate against imports.

Products which can be valued in money and which are capable of forming the subject of commercial transactions will be regarded as 'goods' under art. 30. This is a wide definition and may encompass products which in other areas of law would be regarded as services.<sup>15</sup> It is likely, although undecided, that computer software would be regarded as 'goods' if transported around the Community on disk or some other form of hardware (including firmware). However, if the software is used for providing a service between Member States such as an E-mail service or a remote data-processing service, it may be more appropriate to seek to rely on the equivalent rules concerned with the freedom to provide services under arts 59 to 66 of the EEC Treaty (see 12.2.3 for further discussion).

13. OJ Sp. Ed. 1970 (I), p. 17 (technically only applies to measures in force at the end of the transitional period, which has now ended). Recently referred to by the European Court of Justice in *Torfaen Borough Council v B & Q plc* (case 145/88) [1990] 2 QB 19.

14. *Procureur du Roi v Dassonville* (case 8/74) [1974] ECR 837 at p. 852.

15. *Commission v Italy* (case 7/68) [1968] ECR 423.

### 12.2.2 Exceptions and limitations

Under art. 36 of the EEC Treaty, it is possible for a government or government authority to justify its restrictions on trade on the grounds of:

- (a) morality;
- (b) public policy or public security;
- (c) protection of health and life of humans, animals or plants;
- (d) protection of national treasures possessing artistic, historic or archaeological value; or
- (e) protection of industrial and commercial property.

In addition, there is an obligation imposed on the government bodies concerned that any exemptions to the principles of free movement should not constitute a means of arbitrary discrimination or a disguised restriction on trade. Exemptions to the free movement rules are to be restrictively interpreted and measures taken should not be disproportionate to their objective. Once the Community authorities have issued harmonising measures, it becomes impossible for a government body to rely on an equivalent national law to justify restrictive conduct. However, the European Court of Justice has recognised certain further grounds for excluding goods from particular territories. In particular, it has recognised the following as potential justifications for restrictions on the free movement of goods:

- (a) fiscal supervision;
- (b) public health;
- (c) fairness of commercial transactions;
- (d) protection of the consumer.

### 12.2.3 Freedom to provide services: article 59

Article 59 of the EEC Treaty guarantees, as a general rule, the freedom to provide cross-border services. In its *Sacchi* decision<sup>16</sup> the European Court of Justice held that a television signal should be regarded as a provision of services. It is likely that transborder computer services or telecommunications services would be regarded as services falling within the definition of art. 60. Such services must be provided for remuneration and must not fall within the rules concerning the free movement of goods, capital or persons.

In order to rely on the free movement of services provisions contained in the Treaty a national must be 'established' in one of the EC Member States. This may normally be accomplished by setting up a company.

Article 59 is subject to limitations which may be invoked by Member States or government bodies on the grounds of:

- (a) activities concerned with the exercise of official authority (art. 55);
- (b) public policy, public security or public health (art. 56);
- (c) non-economic public interest exceptions, e.g., where copyright owners have 'performance' rights in the services concerned.

16. *Italy v Sacchi* (Case 155/73) [1974] ECR 409.

### 12.2.4 Public procurement

Public bodies are the biggest purchasers of information technology in most parts of Europe. It has for instance been estimated that in the UK 45 per cent of all computers are bought through public procurement.<sup>17</sup>

The prohibitions contained in arts 30 and 59 of the EEC Treaty are the bases for the specific public procurement rules. In its 1985 White Paper, the Commission identified concerns about the purchasing practices of Government bodies.<sup>18</sup> In summary, these concerns were:

(a) The authorities concerned purchased on a national basis which led to the continued partitioning of national markets contrary to the single market objective.

(b) The EEC Treaty as a whole, and arts 30 and 59 in particular, lays down basic rules which mean that discrimination by governments and government bodies in favour of national suppliers is illegal. However, these rules were ignored in practice.

A particular example of such discrimination occurred when the Dundalk Urban District Council required all tenders for the construction of a water main to comply with Irish standards. Only one company had obtained such approval and, perhaps unsurprisingly, that was an Irish company. A Spanish manufacturer tendering pipes which met an equivalent international standard complained to the Commission which took Ireland to the European Court of Justice.<sup>19</sup> The European Court held Ireland to have breached art. 30. This case demonstrates the application of the underlying Treaty rules. However, specific rules which supplement but do not override the Treaty have now been created so that the rules are more widely observed.<sup>20</sup> The following have now been adopted:

(a) The Council Directive of 17 December 1969 on the Supply of Goods to the State and Other Authorities.<sup>21</sup>

(b) The Council Directive of 21 December 1976 on the Coordination of Procedures for the Award of Public Supply Contracts.<sup>22</sup>

(c) The Council Directive of 22 July 1980 on the Adaptation and Supplementation of Directive 77/62/EEC on the Coordination of Procedures for the Award of Public Supply Contracts.<sup>23</sup>

17. Clifford Chance, *Information Technology 1992* (London: Clifford Chance 1990), p. 31.

18. See International Institute for Legal and Administrative Technology, *Public Procurement* (Cologne 1990), p. 14 et seq.; Brechon and Moulènes, *Les Marchés Publics Européens* (Droit Communautaire, droit comparé), Dossiers et documents de la Revue française de Droit administrative (Paris 1989), pp. 37-69.

19. *Commission v Ireland* (case 45/87) [1988] ECR 4929.

20. See Elke Schmitz, *Das Recht der öffentlichen Aufträge im Gemeinsamen Markt* (Baden-Baden 1972), p. 128 et seq.

21. Directive 70/32/EEC, OJ No. L 13, 19 January 1970, p. 1.

22. Directive 77/62/EEC, OJ No. L 13 of 15 January 1977, p. 1.

23. Directive 80/767/EEC, OJ No. L 215 of 18 August 1980, p. 1.

(d) The Council Directive of 22 March 1988 on the Coordination of Procedures on the Award of Public Supply Contracts.<sup>24</sup>

(e) The Council Directive of 21 December 1989 on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts.<sup>25</sup>

*12.2.4.1 Applicability of the Directives* All the rules mentioned above apply through implementing national laws to written contracts for the supply of goods. The Directive of 22 March 1988 has extended their applicability to leasing agreements and contracts for hire.

The Directives do not, however, refer to services or works.<sup>26</sup> This restriction leads to unforeseeable consequences with regard to information technology contracts, as the rules are not applicable where public authorities are awarding contracts on:<sup>27</sup>

- (a) project management services and consultancy;
- (b) training;
- (c) maintenance;
- (d) services of a bureau; or
- (e) bespoke software.

In March 1991, the Commission published a proposal for a Directive on services which will close this dangerous gap in the future.<sup>28</sup>

Additionally, the regulations only deal with contracts for the supply of 'goods'. This terminology leads to the problem whether standard software may be regarded as a 'good' within these EC Directives. This issue has been the subject of controversial discussion for some time with regard to the applicability of the Sale of Goods Act 1979. The New South Wales Supreme Court<sup>29</sup> has held that the sale and installation of hardware and software constitutes a sale of goods and the judgment has been used to support the general classification of software itself as a 'good'.<sup>30</sup> This view has, however, been rejected by some voices in the literature stating that standard software has to be regarded as intangible.<sup>31</sup> (Further discussion of this issue can be found in 2.1.4.)

Even the EC authorities appear to have given divergent views on this issue. On the one hand, the EC Commission took the view that software is a product

24. Directive 88/295/EEC, OJ No. L 127 of 20 May 1988, p. 1.

25. Directive 89/665/EEC, OJ No. L 395 of 30 December 1989, p. 33.

26. See art. 1(b) of Council Directive 77/62/EEC.

27. Stephen Saxby (ed.), *Encyclopedia of Information Technology Law* (London: Sweet & Maxwell, 1992), paras 6.118 to 6.293.

28. COM(90) 372 final - SYN 293, 91/C 23/01, OJ No. C 23, 31 January 1991, p. 1. Cf. the first (unofficial) proposal of the Commission submitted in April 1990 (Doc. CCO/90/28).

29. *Toby Constructions Products Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48.

30. See also Reed (1988) 4 CL&P 149.

31. See S. W. Cavanagh, 'The Supply of Computer Software - Goods or Services?' (1984) 12 ABLR 195.

for the purposes of the EC Directive on product liability.<sup>32</sup> On the other hand, the regulations on the public procurement of telecommunications services (see 12.2.4.3) make a distinction between software and goods.<sup>33</sup>

The Public Supply Directives apply to all public supply contracts of a value of at least 200,000 ECUs. The sectors of telecommunications, energy, transport and water were expressly excluded. A separate Directive, concerned with both supplies and works, will apply the EC procurement rules to the telecommunications, energy, transport and water sectors from 1 January 1993 at the earliest.

*12.2.4.2 Main elements* The Directives state that public bodies have generally to award their supply contracts by open tendering, i.e., tendering which is open to all interested suppliers. Selective tendering or negotiations with chosen suppliers are only lawful in some special circumstances described in the Directives; the use of these procedures must be justified by the public body in a report. This choice of open tendering is contrary to past practice in the UK which has been to award the bulk of contracts by selective tendering.<sup>34</sup>

The Directives have additionally stressed the importance of transparency in the public procurement sector. Public bodies are required to publish announcements of an award in the Official Journal of the EC. Furthermore, they have to announce their award decisions and the total sum of expected purchases for the year.

*12.2.4.3 Public telecommunications contracts* As mentioned above, the Directives on public supply contracts do not apply to telecommunications. This exemption proved to be unsatisfactory so the EC authorities created a separate Directive to deal with public telecommunications contracts. On 17 September 1990 these considerations led to the announcement of the Council Directive on Public Procurement in the Sectors of Water, Energy, Transport and Telecommunications.<sup>35</sup>

This Directive applies to all public bodies' contracts for telecommunication products (including software) and services; the relevant threshold is 600,000 ECUs. Contracting entities have to define technical specifications by reference to European standards; they are free to choose open, selective or negotiated tendering procedures. In addition, they have to publish a list of their total anticipated procurement during the next 12 months. The Directive allows the bodies to which it applies, which are known as 'contracting entities', to maintain approved lists of contractors competent to carry out particular work. The contract has to be awarded to the tenderer who submitted the lowest assessed tender, i.e., the tenderer whose tender offers the best overall value for

32. Answer to written question No. 706/88, OJ No. C 114, 8 May 1989, p. 42.

33. See art. 1(3)(a) of Council Directive 90/351/EEC referring to supply contracts on 'goods or software'. See also art. 29(2) of that Directive stating that software has to be regarded as a 'good' for the purpose of the article.

34. International Institute for Legal and Administrative Technology, *Public Procurement* (Cologne 1990), p. 81 et seq.

35. Directive 90/351/EEC, OJ No. L 297, 25 October 1990, p. 1.

money. According to the Directive, the contracting entities may refuse to award a tender on the grounds of non-EEC origin under certain circumstances.

The EC Commission is preparing a second Directive on the coordination of public procurement regulations with regard to these four sectors<sup>36</sup> which has recently been approved by the European Parliament.<sup>37</sup>

**12.2.4.4 Council Decision 87/95/EEC** On 22 December 1986, the Council announced its Decision on standardisation in the field of information technology and telecommunications.<sup>38</sup> This Decision calls for the mandatory use of European and international standards by public-sector authorities. Contracts for information systems of value above 100,000 ECUs must refer to these standards. This obligation is not binding upon orders concerning 'innovative' systems or if an adherence to the standards would lead to an 'uneconomic solution'.

The Decision is binding upon the EC Member States, which have to transform it into national law. In March 1988 a number of functional standards were published by the UK Central Computer and Telecommunications Agency (CCTA) which are now used as mandatory standards under Decision 87/95/EEC.

#### 12.2.5 EC law remedies

According to the Remedies Directive (89/665/EEC) of 21 December 1989, the Member States have to set up a judicial or administrative authority which examines alleged infringements against the EC public procurement regulations. This authority must be able:

- (a) to suspend the award procedure;
- (b) to cancel unlawful decisions;
- (c) to order the removal of discriminatory specifications; and
- (d) to grant damages to injured parties.

In addition to the Remedies Directive (89/665/EEC), arts 30 and 59 of the EEC Treaty may be relied upon in national courts and it is possible to complain to the European Commission to ensure that the national authority complies with the Member State's treaty obligations. This may provide an effective practical remedy where, for example, a supplier considers he has been discriminated against as a result of the nationalistic purchasing practices of the government authority or where a supplier suffers from some other form of discrimination by government authorities.

In the *Francovich* case,<sup>39</sup> the European Court of Justice held that directly effective provisions (such as arts 30 and 59) may be relied upon by individuals

36. Second proposal of the EC Commission, OJ No. C 179, 19 July 1991, p. 18. For the first proposal see OJ No. L 297, 29 October 1990, p. 1.

37. EP Doc A3-339.91.

38. Decision 87/95/EEC, OJ No. 36, 7 February 1987, p. 31.

39. *Francovich Bonifazi v Italy* (cases C60/90 and C9/90). *The Times*, 20 November 1991.

against the State. It also reviewed the issue of State liability and held that the principle of Member State liability for damage resulting from infringements of Community law was inherent in the EEC Treaty. Uncertainty remains over the full extent of a Member State's liability, but in principle it is possible to claim damages against a Member State for its failure to observe art. 30 or art. 59. This might be of considerable importance in the context of the public procurement regime as an additional weapon against a Member State body such as a local authority.

## 12.3 EC COMPETITION LAW

The objects of EC competition law can be regarded as twofold. Article 3 of the EEC Treaty provides that:

For the purposes set out in art. 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

- (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; . . .
- (f) the institution of a system ensuring that competition in the common market is not distorted.

The European Court of Justice has held that the competition rules should be construed in the light of the aims and intentions expressed in these provisions.

The first aim is to preserve and create unrestricted competition between businesses as a stimulant to economic activities in the Community. The Treaty recognises, and there is a presumption in favour of, a 'free market' economic policy.<sup>40</sup>

The second intention is that the economic benefits of the market should be available to all, and that the market should truly be regarded as a 'common' market, or to adopt more recent terminology, a 'single' market. The second intention is that competition policy should be used as a method of prohibiting agreements which create obstacles to trade between Member States. The aim of provisions such as arts 30 and 59 of the EEC Treaty was to abolish government restrictions on the movement of goods and services across Community borders. The competition rules strike down agreements which attempt to divide markets or re-erect such barriers to trade.

40. As the Commission stated in its First Report on Competition Policy: 'An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structure continuously to adjust to technological development. Through the interplay of decentralised decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the *sine qua non* for a steady improvement in living standards and employment prospects within the countries of the Community.'

### 12.3.1 EC Treaty competition rules

Articles 85 to 94 of the EEC Treaty are the principal Treaty provisions which contain the competition rules. The broad scheme of these provisions is as follows:

*Article 85* prohibits all agreements and restrictive practices, decisions by associations of undertakings and concerted practices which may affect trade and which have as their object or effect the prevention, restriction or distortion of competition within the Community.

*Article 86* prohibits all abuses of 'dominant' or 'monopoly' power in the Community.

*Articles 87 to 89* provide the basis for the EC Council of Ministers, acting by qualified majority and after consulting the European Parliament, to adopt implementing Regulations and Directives. This machinery has been used to grant the Commission its powers of monitoring and enforcement.

*Articles 88 and 89* provide for transitional rules. These presently apply in relation to air and sea transport.

*Article 91* provides the basis (along with art. 113) for the rules which prohibit the 'dumping' of goods from outside the Community on to the Community market. Dumping essentially consists of an anticompetitive practice by which goods are sold in the Community at less than the price they are sold in a non-EC market.

*Articles 92 to 94* provide the Commission with supervisory responsibilities and powers in relation to government grants and aids to industry throughout the Community. These are the so-called 'State aid' rules. The Commission can only allow aids to be permitted where certain economic and social objectives are fulfilled. One intention is to prevent governments providing incentives to inefficient national champions or industries.

### 12.3.2 Article 85(1)

Article 85 deals with collusion or cooperative behaviour between independent businesses. The scheme of the article is to prohibit all such arrangements or practices and provide for an exemption for particular types of beneficial arrangements (art. 85(3)). In order to take advantage of the exemption, the economic benefits must outweigh the anticompetitive effects.

Infringement of art. 85(1) will arise where the following are fulfilled:

- (a) some form of cooperation occurs between undertakings, being either an agreement, decision or concerted practice; and
- (b) that cooperation has as its object or effect the restriction of competition within the Common Market; and
- (c) that cooperation has some effect on trade between Member States; and
- (d) that cooperation is not '*de minimis*'.

Infringement of art. 85 has the consequence that the restrictive provisions are void and the Commission is entitled to impose fines of up to 10 per cent of the combined group worldwide turnovers of the businesses concerned.

However, as indicated above, exemptions are available from art. 85(1). These exemptions are only available on limited grounds and may be granted to an individual agreement following a notification or where the agreement corresponds to an exemption for a particular category of agreements (known as a 'block exemption') (see 12.3.2.13).

*12.3.2.1 Cooperation between undertakings* 'Undertakings' means all legal or natural persons carrying on economic or commercial activities.<sup>41</sup> The definition of 'undertakings' is important in considering agreements between members of the same economic group, e.g., between parent and subsidiary or between two companies having the same parent. Provided such arrangements can be regarded as the allocation of internal functions within one and the same unit, they will not be regarded as infringing art. 85(1). Whether or not one company is to be regarded as part of a single 'undertaking' depends on whether these companies are economically independent. The factors to take into account will be the level of shareholding, and the extent to which the business plans and policies of the subsidiary are controlled by the parent and whether the subsidiary's decision-making responsibilities are truly independent.

An 'agreement' will usually be easy to identify. It will include a contract or other form of written arrangement such as 'heads of agreement' or memoranda of understanding. There is no requirement that the agreement should be legally binding. Oral and written arrangements and gentlemen's agreements may amount to an agreement within the meaning of art. 85(1). Where an agreement has been ended but the parties to that agreement continue to abide by its terms, it can be viewed as a concerted practice. Evidence of a concerted practice may be found by the Commission from a number of sources. Parallel behaviour may not, by itself, amount to a concerted practice, but where such parallel behaviour occurs in circumstances where the perpetrators meet together, follow each other's prices and there is limited circumstantial evidence of collusion, the Commission has found a concerted practice.<sup>42</sup> The European Court of Justice has defined a concerted practice as:

A form of coordination between undertakings which, without having reached the stage when an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.

In practice, a company must be extremely careful to ensure that direct or indirect contact with competitors does not lead to any limitation of competition.

A decision of an association of undertakings would typically include trade association resolutions and recommendations. Such activities, if they fulfil the other criteria of art. 85(1), will be regarded either as an agreement (in consequence of the general internal regulations or constitution of the trade

41. *Polypropylene*, OJ No. L230, 18 August 1986, p. 1.

42. *Imperial Chemical Industries Ltd v Commission* (case 48/69) [1972] ECR 619.

association) or as a concerted practice between the members of the association. The Commission, in an appropriate case, may find in addition to the members that the association itself has committed an infringement of the rules. As with agreements, there is no requirement that a decision should be legally binding.

**12.3.2.2 Object or effect** There is, strictly, no need for an agreement to have an anticompetitive effect to infringe art. 85(1), it need only have that 'object'.<sup>43</sup> Typically, the Commission could regard an 'exclusivity' clause providing a dealer or licensee with an exclusive territory and preventing the supplier from appointing another dealer or licensee as having the 'object' of restricting competition contrary to art. 85(1). However, an exemption may be available under art. 85(3) for such an exclusivity clause.

To establish whether an agreement has an anticompetitive effect a market analysis is required. It is necessary to take into account the nature and quality of the products covered by the agreement, the agreement in question as part of a series of agreements, the severity of the clauses intended to protect a supplier or distributor, the opportunities available for other commercial operators to supply the same products etc. Market research and analysis would be necessary in justifying an agreement before the Commission for exemption under art. 85(3).

**12.3.2.3 Effect on trade** The requirement for an 'effect on trade between Member States' provides a limited jurisdictional test. The intention of this part of art. 85 was to define the boundary between Community and national law. However, in practice the Commission has been unwilling to deny itself jurisdiction. The goal of market integration, which is the essential aim of the EEC Treaty, can be prevented even where an agreement is confined to one Member State. It is sufficient that an agreement is capable of having an effect on trade between Member States. The basic test is that an agreement must foreseeably affect the pattern of trade between Member States.

**12.3.2.4 De minimis** The effect of an agreement on both inter-State trade and on competition within the Common Market must be appreciable. As has been described above, restrictions on competition must be judged in relation to the market in question, e.g., restrictive clauses in a software licence would need to be looked at in the context of the software market as a whole.<sup>44</sup> The Commission has clarified this issue by an advisory notice.<sup>45</sup> An agreement will not normally be regarded as appreciable and hence will not infringe art. 85(1) if it is between undertakings belonging to groups which:

(a) have a combined turnover which does not exceed 200 million ECUs; and

43. *Société Technique Minière v Maschinenbau Ulm* (case 56/65) [1966] ECR 235. See also *Etablissements Consten SA v Commission* (cases 56 and 58/64) [1966] ECR 299.

44. *Völk v Etablissements Vercauthe Sprl* (case 5/69) [1969] ECR 295.

45. OJ No. C 231, 1986, p. 2.

(b) together enjoy not more than 5 per cent of the total market for the relevant goods or services in the area of the Common Market affected by the agreement.

Members of large corporate groups are excluded but small firms may not be able to rely on the notice since it does not apply where competition in the market in question is restricted by the cumulative effects of 'parallel networks of similar agreements established by several manufacturers or dealers'. This may occur where the market in question is characterised by parallel networks of similar distribution or franchise agreements. It may thus be difficult for the computer industry to rely on the Commission's notice.

**12.3.2.5 Typical agreements caught by article 85(1)** Article 85(1) lists examples of types of agreement which it prohibits. These are agreements which:

(a) '... directly or indirectly fix purchase or selling prices or any other trading conditions'. This includes price-fixing agreements between competitors about the prices at which goods or services are to be supplied to customers. Direct influences on pricing policies are also prohibited. Information exchanges between competitors which disclose prices, discounts or other business secrets, will be viewed as reducing the normal risks of competition and creating cooperation in practice.

(b) '... limit or control production, markets, technical development or investment', e.g., agreements between competitors about which of them is to supply particular customers or territories. Price-fixing agreements are often supported by quotas so that each party can maintain its share of demand. Such agreements are likely to be prohibited.

(c) '... share markets or sources of supply'. Market-sharing has been referred to above. Joint purchasing agreements by which competitors agree to combine their buying power are, equally, prohibited. Collective aggregate discounts are also likely to be condemned.

Export bans, i.e., clauses in agreements that prevent parties from exporting goods from one Member State to another are also regarded as a serious violation of art. 85. Care should be taken in computer agreements that clauses intended to ensure compliance with national security law obligations, e.g. to prevent the sale of high-tech products to the former Eastern bloc countries, do not go further than is necessary, and restrict resale within the Community.

In addition, although the Commission does not necessarily object to all of them, agreements for the creation of joint ventures, long-term purchase, supply or distribution agreements, subcontracting agreements, agency agreements, industrial property licences and agreements for joint purchase and joint sale agreements may all infringe art. 85(1).

**12.3.2.6 Common clauses** A number of clauses may be regarded as having the object or effect of restricting competition contrary to art. 85(1):

**Exclusivity.** An exclusivity obligation would usually restrict the seller or licensor from competing with the reseller or licensee. It may also restrict the seller or licensor from selling to firms other than the reseller or licensee, either within or outside a particular territory. A licensee or reseller may be restricted from competing with other licensees or resellers in other territories.

Exclusivity obligations in contracts for the resale of goods (as opposed to agreements which involve the licensing and sublicensing of intellectual property rights) may benefit from the exclusive distribution or exclusive purchasing block exemptions. Where the licensee of intellectual property rights is concerned, there are at present two block exemptions which may exempt the exclusivity clauses:

(a) A block exemption is available for patent licensing agreements which contain exclusivity obligations.

(b) Exclusive agreements for the transfer of technology which are substantially comprised as know-how will benefit from the know-how licence block exemption. Know-how which is combined with other forms of intellectual property is covered by the know-how licence block exemption and, to an extent, certain computer software licences may benefit from this block exemption, provided the software is 'of assistance in achieving the object of the know-how licence'.

**Non-compete.** Non-compete provisions may well infringe art. 85(1). However, it may be economically efficient for a reseller to be forced to concentrate his sales on the goods in question. In consequence, non-compete provisions are exempted under the exclusive distribution, purchasing, patent and know-how block exemptions.

**No-challenge clauses.** Clauses where the licensee is prohibited from challenging the validity of the licensed intellectual property right.

**Post-term use provisions.** Provisions where the duration of the licensing agreement is automatically prolonged beyond the expiry of intellectual property rights existing at the time the agreement was entered into.

**Royalty calculation clauses.** Agreements under which the licensee is charged royalties on products which are not entirely or partially produced by means of the intellectual-property-based process in question (specifically in relation to patents and know-how) or where the licensee is charged royalties on the use of know-how or confidential information which has entered into the public domain otherwise than by the fault of the licensee.

**Quantity restrictions.** Where the quantity of licensed products one party may manufacture or sell is restricted or where other quantitative restrictions on the exploitation of the intellectual property rights in question are imposed.

**Price and discount restrictions.**

**Customer restrictions.** Where one party is restricted as to the type or class of customer he may serve.

**Grant-back arrangements.** Where the licensee is obliged to assign or grant back all the improvements to intellectual property rights which are created independently from the licensed intellectual property rights and are not part of the licensed intellectual property rights.

**Tying restrictions.** Where the licensee is required to accept goods or services which he does not want as a condition of entering into an intellectual property right licence, e.g., a requirement to obtain maintenance or support for licensed software. However, such a restriction may be acceptable when it can be shown that it is necessary for the technically satisfactory exploitation of the product concerned.

**Export restraints.** Where one or other of the parties is required to refuse (without objective reason) to meet demand from users or resellers in other Member States of the Community.

**12.3.2.7 Acceptable cooperation** The Commission issued in 1968 a 'notice on cooperation agreements' which sets out categories of agreement it considered did not fall within art. 85(1). This notice may provide useful guidance but its terms are narrowly construed by the Commission. There are eight categories of acceptable cooperative activity:

**Information exchanges,** e.g., exchanges of market research, comparative studies of enterprises or industries and the preparation of statistics and calculation models, provided that this information does not lead to coordination of market behaviour. The line may be difficult to draw and extreme caution should be exercised where an information exchange is proposed.

**Financial cooperation,** e.g., accountancy cooperation, the provision of credit guarantees, debt collection and consultancy facilities on business and tax matters.

**Research and development.** See also block exemption Regulation 418/85<sup>46</sup> at 12.3.3.5.

**Sharing of production, storage and transport facilities.**

**Tendering on cooperation in the execution of orders,** where either the parties are not in competition with each other or, where they are competitors, they would not be able individually to execute a given order.

**Joint selling or joint provision of after-sales services,** but only where the partners are not actual or potential competitors.

**Joint advertising,** provided that there is no restriction on individual advertising.

**Common quality symbols or labels,** where the label is available to all competitors on the same conditions.

**12.3.2.8 Agreements outside the scope of article 85(1)** Apart from the Commission's notice on cooperation agreements, it has issued notices on agency<sup>47</sup> and subcontracting.<sup>48</sup> In its agency notice the Commission stated that agreements between principal and agent do not infringe art. 85(1). In several cases since, both the Commission and Court have made it clear that it is difficult to rely on this exception. In order to come within the exception the agent must take instructions in detail from the principal and not be a firm capable of acting

46. OJ No. L 53, 1985, L p. 5.

47. 24 December 1962.

48. OJ No. C 1, 3 January 1979, p. 2.



in its own name and on its own behalf. The test is difficult to apply and will not apply to dealers which are independent firms. Subcontracting arrangements are those arrangements by which the contractor sets out in detail the products he wishes a subcontractor to manufacture. The subcontracting notice may be valuable in the context of software development agreements since it may entitle firms commissioning software to obtain exclusive rights over the software once it has been developed.

*12.3.2.9 Selective distribution* Selective distribution is widely used in the computer industry for the distribution of both hardware and software. A system of selective distribution, i.e., the appointment of distributors which are 'selected' on objective criteria relating to the quality of the distributor, will be compatible with art. 85(1) provided that:

- (a) The products concerned are sophisticated, e.g., computer products which require a high level of expertise or back-up services.
- (b) The qualitative criteria for the appointment of distributors relate to the technical capability to supply the goods or services in question and the suitability of their premises.
- (c) The qualitative criteria must be applied in a nondiscriminatory way – any qualified reseller who wishes to join the system must be admitted.<sup>49</sup>
- (d) No 'quantitative' restrictions may be included, i.e., no restrictions may be included on the number of resellers admitted to the system and restrictions on the geographic location of dealers cannot be included. If such restrictions are included, the system may be suitable for individual exemption under art. 85(3) or the franchise block exemption should be considered.

Selective distribution systems are likely to create higher prices to the consumer and to restrict, to an extent, the outlets for a particular product. An obligation can be imposed on authorised resellers to sell only to other authorised resellers or end-users and the supplier may refuse to admit insufficiently-qualified dealers to the network.<sup>50</sup>

In the context of distribution of computers, the Commission accepted that no infringement of art. 85(1) occurred for IBM's selective distribution system for personal computers (PCs).<sup>51</sup> The following were important to the Commission's decision:

- (a) IBM PCs were sophisticated products and customers were unsophisticated (although this may change over time).
- (b) The capabilities and price of the IBM PC meant that it was likely to be sold to business and professional users who required information on:
  - (i) the type of services a computer may offer;

49. *AEG v Commission* (case 107/82) [1983] ECR 3151. A fine of 1 million ECUs was imposed where a qualified reseller was refused admission.

50. *Metro v Commission (No. 1)* [1970] ECR 1875.

51. OJ No. L 118, 1984, p. 24.

- (ii) how computers work and the capabilities of the software; and
- (iii) the costs, benefits, advantages and disadvantages of alternative systems.

The Commission accepted certain criteria for the appointment of dealers:

- (a) Dealers needed to have appropriate space for demonstration purposes and were required to keep at least one PC available for demonstration purposes.
- (b) Dealers were required to show ability to provide customers with technical support and training.
- (c) Dealers had to employ sales staff experienced in the use of PCs or willing to be trained (one week) in IBM's PCs.
- (d) Dealers were to provide service facilities and experienced staff trained in servicing IBM's PCs.
- (e) Dealers had to show an ability to run a PC-sales business.

*12.3.2.10 Intellectual property* It is possible to argue that certain contractual restrictions, relating to the 'essential subject-matter of intellectual property rights' do not restrict competition. This approach identifies the essence of an intellectual property right and then regards any clause which relates to that right as being outside the scope of art. 85(1). For example, copyright protection entitles the copyright owner to restrict the reproduction of the copyright work. An agreement between a supplier and a distributor which involves a copyright licence, such as a software licence, would usually restrict the distributor from copying, except for back-up purposes, and may also impose restrictions on end-users from making copies other than back-up copies. Since the copyright owner is legitimately entitled to impose such a requirement as it relates to copyright in the software being licensed, those 'restrictions' which relate to 'copying' cannot be regarded as infringements of art. 85(1). Obligations are often imposed in software licences preventing a licensee from modifying the software, reverse engineering the object code, or sublicensing or assigning without the permission of the licensor. Such obligations could in the past be regarded as not infringing art. 85(1) since they could be viewed as relating to the essential subject-matter of the copyright which was being licensed.

Following the Commission's directive (91/250/EEC) on scope of copyright protection given to software, the 'essential subject-matter' of the software has been defined. Restrictions on modification or reverse engineering which go beyond the Directive may now be regarded as restrictions of competition.

Any restrictions which relate to the exercise of the copyright which is being licensed may be struck down if they appreciably restrict competition and trade between Member States and hence infringe art. 85(1).

*12.3.2.11 Nungesser* In a number of cases, the European Court of Justice has held that contractual provisions giving a degree of protection against competition do not fall within art. 85(1) if they are necessary to establish competition in the first place. This is a 'but for' test; but for a restrictive clause,

no competition would exist since no agreement would be entered into.<sup>52</sup> In its judgment in *L. C. Nungesser KG v Commission* (case 258/78) [1982] ECR 2015, the European Court of Justice considered an exclusive licensing agreement which had appointed a licensor for a particular territory but prevented the licensor from competing with the licensee or granting further licences in the territory in question. The European Court of Justice held that no restriction within art. 85(1) arose and stated that its reasoning could apply to agreements involving intellectual property rights but only where the subject-matter of the contract involved the introduction of something 'new' into the territory in which it was being marketed, and in the circumstances the products in question involved significant research and development. Without the restrictions the licensor would not have entered into the agreement – the restrictions were vital to secure the risk of launching the new product.

It is possible to develop this argument by analogy and regard source code to be similar, in economic terms, to basic maize seed which was at issue in *L. C. Nungesser KG v Commission*, since they both involve considerable research and development. On this basis a licensor could restrict the reseller from sublicensing source code.<sup>53</sup>

**12.3.2.12 Coditel** In its judgments concerning *Coditel*,<sup>54</sup> the European Court of Justice considered that exclusivity and prohibition on resale outside an exclusive territory did not infringe art. 85(1). The particular characteristics of the market and the intellectual property right concerned were taken into account. It is possible to regard this case as a case concerned with performance rights which are subject to copyright protection in many Member States. Without relying on his performance right the licensor would be unable to predict actual or probable royalty levels for films which have been licensed.

This characteristic of films, that they can be shown a number of different times to different sizes of audience, influenced the European Court of Justice to hold that in the circumstances:<sup>55</sup>

The right of the copyright owner . . . to require fees for any showing of a film is part of the essential function of the copyright in this type of literary or artistic work.

Many types of information technology products may benefit from this approach.

Protection may be available for different parts of a computer system. A restriction may be imposed on the distribution of computer software as part of the right to prevent copying. In addition, provided the performance-right type

52. *Société Technique Minière v Maschinenbau Ulm* (case 56/65) [1966] ECR 235 (otherwise known as the indispensable inducement rationale).

53. See also *SPRL Louis Erauw-Jacquery v SC La Hesbignonne* (case 27/87) [1988] 4 CMLR 576.

54. *Coditel SA v Ciné Vog Films (No. 1)* (case 62/79) [1980] ECR 881, *Coditel SA v Ciné Vog Films (No. 2)* (case 262/81) [1982] ECR 3381.

55. See also cases concerning copyright protection such as *Basset v Sacem* (case 402/85) [1987] ECR 1747 and *Ministère Public v Tournier* (case 395/87) [1991] 4 CMLR 248.

of copyright protection is available (and this is usually only the case where the work is shown or broadcast to the public), performance of that software may be regarded in a similar way to the performance of a film. In such cases, restrictions on licensees which limit the place of performance (site restrictions), the number of performances (e.g., limitation on the use of software to a particular computer system) and the performance of that software via remote terminals or via a number of remote terminals may be regarded as falling outside art. 85(1).

The *Coditel* and *Nungesser* cases may be regarded as examples of a 'rule of reason' approach which is being applied in the computer/communications industry. Such an approach may find wider application in future cases. The Court of Justice has adopted this approach in other industries in a number of cases. (As a recent example, see *Stergios Delimitis v Henninger Brau* (case 234/89), judgment 28 February 1991.)

### 12.3.3 Exemption: Article 85(3)

Article 85(3) provides for exemptions from art. 85(1). As mentioned above, an exemption may be available for an individual agreement on notification or for an agreement satisfying the terms of a block exemption Regulation. Article 85(3) provides that two positive and two negative conditions must be satisfied. An exemption will be available if:

- (a) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress; and
- (b) consumers are allowed a fair share of the resulting benefit; and
- (c) only those restrictions in the agreement which are 'indispensable' to the attainment of the objectives of the agreement are imposed on the undertakings concerned; and
- (d) the undertakings concerned are not afforded the possibility of eliminating competition in respect of a substantial part of the products in question.

Exemptions are available either on an individual basis or may be published in the form of Regulations by the Commission exempting categories of agreements which fall within the terms of the regulation. Such exemptions are known as 'block exemptions'. The following points should be noted about block exemptions:

- (a) Unless expressly permitted, any restriction contained in an agreement which falls outside the terms of the block exemptions may mean that the entire agreement falls outside the block exemption.
- (b) The Commission specifies permitted and non-permitted clauses – the block exemption may not be sufficiently flexible for many types of commercial agreements.

The most important block exemptions are briefly described below.

**12.3.3.1 Exclusive distribution**<sup>56</sup> Agreements for the resale of goods under which a supplier agrees with the distributor to supply goods only to that distributor may benefit from this block exemption. Software licensing agreements will probably not be regarded as relating to goods. Shrink-wrap software will thus probably not be covered. However, where software is part of a hardware product and a low-value part, the product should benefit from the block exemption. This block exemption would probably not apply to 'value-added reseller agreements' which would probably not be regarded as agreements for resale. The block exemption will probably also be inapplicable to OEM agreements (i.e., where a supplier's products are sold only under the distributor's trademarks).<sup>57</sup> Under the block exemption, in addition to exclusivity obligations, the supplier, at his option, may agree not to supply contract goods to users in the contract territory. Often the computer equipment supplier will want to retain the ability to supply large users direct. A distributor may be required to refrain 'from seeking customers, from establishing any branch and from retaining any distribution depot' for the contract goods outside the contract territory. The block exemption will not apply if certain blacklisted clauses are included.

**12.3.3.2 Exclusive purchasing agreements**<sup>58</sup> Where goods are supplied to a reseller which undertakes to obtain its requirements only from one supplier, the agreement may benefit from the exclusive purchasing block exemption. By contrast with exclusive distribution, the exclusive purchasing block exemption does not allow any restriction on the supplier to refrain from delivering the products concerned to other resellers in the same territory. The only obligation which may be imposed on a supplier without loss of the exemption is the obligation not to compete directly with the reseller in his principal sales area: a supplier cannot be prevented from appointing other resellers in that area. The reseller may be required not to manufacture or sell goods competing with the contract goods and he may accept marketing obligations similar to those provided under the exclusive distribution block exemption.

**12.3.3.3 Franchising**<sup>59</sup> This block exemption is only available for obligations relating to the use of a common name or shop sign, the communication of know-how by the franchisor to the franchisee and the continuing provision of commercial or technical assistance during the life of the agreement. The know-how in question must be 'secret, substantial and identified'. The franchisor may grant an exclusive territory and agree not to grant a franchise or himself exploit the franchise in that territory. The franchisor may also agree not to supply goods to third parties. The franchisee may be required to limit the exploitation of his franchise only to the contract premises and not to seek customers outside his territory, and to buy the franchisor's goods only from

56. Regulation 1983/83 OJ No. L 171, 1983, p. 1.

57. *ICL Fujitsu* OJ No. C 120, 21 August 1986, p. 5.

58. Regulation 1984/83, OJ No. L 173, 1983, p. 5.

59. Regulation 407/88, OJ No. L 359, 1988, p. 46.

nominated sources and not to buy competing goods. Like the exclusive distribution and purchasing block exemptions, this block exemption contains blacklists of prohibited clauses.<sup>60</sup>

**12.3.3.4 Specialisation agreements**<sup>61</sup> A block exemption is granted to agreements under which the parties accept 'reciprocal obligations':

- (a) to specialise in the manufacture of one product and to leave to the other party the manufacture of another product; or
- (b) to manufacture certain products or to have them manufactured only jointly.

A non-reciprocal obligation to cease production is not within the Regulation. Care needs to be taken to decide whether an agreement is a specialisation agreement and not a market-sharing agreement. This block exemption is subject to a threshold – the undertaking concerned must not represent more than 20 per cent of the market for such products in a substantial part of the Common Market and there is also a turnover threshold.

**12.3.3.5 Research and development agreements**<sup>62</sup> Three types of agreement may be exempted under the research and development (R & D) block exemption:

- (a) Joint R & D products or processes and joint exploitation of the results.
- (b) Joint exploitation of the results of R & D jointly carried out under a prior agreement or plan between the parties.
- (c) Joint R & D without subsequent exploitation.

Exploitation includes manufacture, and licensing of intellectual property rights, but not distribution or selling.

**12.3.3.6 Patent licensing**<sup>63</sup> Exclusive and other patent licences are exempted under this block exemption. The licence may include know-how where it permits a better exploitation of the licensed patent. The licensor may agree not to license anyone else in the licensee's territory and not to exploit the licensed technology there himself. The licensee may also be restricted from exploiting the licensed invention in the territory of the licensor. Competition between licensees may also be restricted to a limited degree. Provisions that restrict competition and are not specifically exempted may benefit from the 'opposition procedure'.

60. By contrast to the Commission's approach, the European Court of Justice indicated in *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* (case 161/84) [1986] ECR 353 that many clauses in a franchise agreement fell outside the scope of art. 85(1) in any event.

61. Regulation 417/85, OJ No. L 53, 1985, p. 1.

62. Regulation 418/85, OJ No. L 53, 1985, p. 5.

63. Regulation 2349/84, OJ No. L 219, 1984, p. 15.

**12.3.3.7 Know-how licensing agreements<sup>64</sup>** Provided know-how is substantial and secret, it may benefit from the know-how licensing block exemption for exclusive know-how licences. Combined know-how and trade-mark or other intellectual-property-type licences may be governed by the Regulation, but only where restrictions relating to the other intellectual property are ancillary to the know-how. The Regulation is very similar to the patent licence block exemption but the periods for territorial protection are different. A period of protection for patent licensing is for five years from the first time the contract products were first put into the market within the EC – the know-how licence block exemption applies for 10 years from the first licence in the territory. In other respects the know-how licence block exemption is similar to the patent licence block exemption.

**12.3.3.8 Intellectual property licensing generally** As indicated above at 12.3.2.6, a number of common clauses in intellectual property licences are likely to infringe art. 85(1). These clauses do not benefit from exemptions in relation to either patent or know-how licensing and they are likely to be prohibited in the context of copyright (software) and trade-mark licensing. The existing block exemption regulations may provide arguments for the individual exemption of information technology agreements containing software. However, such arguments will only be appropriate when applying for individual exemption in the context of an agreement with similar economic benefits to a patent or a know-how licence.

#### 12.3.4 Article 86

Article 86 of the EEC Treaty is concerned with unilateral activity by one party. It provides that:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

A dominant position is defined in qualitative terms:<sup>65</sup>

A position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition in the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.

A number of factors are to be taken into account in order to establish whether a particular undertaking is in a dominant position:

- (a) the market share of the undertaking and of its competitors;

64. Regulation 556/89, OJ No. L 61, 1989, p. 1.

65. *Michelin v Commission* (case 322/81) [1983] ECR 3461.

- (b) the undertaking's supply and/or purchasing power;
- (c) technical knowledge and expertise of the undertaking;
- (d) availability of raw materials and supplies;
- (e) the scale of the undertaking's activities – its capital and resources;
- (f) exclusionary effect of any sales or distribution networks;
- (g) intellectual property right protection;
- (h) customer dependence;
- (i) the exclusionary effect of government licences (such as telecommunications licences limiting the number of competitors in a particular market).

Dominance is assessed in relation to a relevant market which comprises the products which may be regarded as substitutable by users (demand substitutability) and in relation to the ability of suppliers or manufacturers to switch from one product to another (supply substitutability). A product market can only exist in relation to a particular geographic area where the conditions for competition are sufficiently similar.

As a practical guide, a dominant position is not normally found unless the market share of the business concerned is above 35 per cent. However, in relation to the computer industry, the relevant market may be narrowly defined, or even defined in terms of a single computer supplier's products, services or software. The more narrowly defined the market, the higher a particular supplier's market share. Also, a supplier may find himself dominant in the spare parts or maintenance services for its own products.

**12.3.4.1 Types of abuse** A number of types of abusive conduct are listed in art. 86: directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, markets or technical development, discrimination by applying dissimilar conditions to equivalent transactions, or similar conditions to dissimilar transactions, tying practices by which unrelated products are only supplied together.

Practical examples of abuses in the computer industry would include:

(a) Predatory pricing, where a computer manufacturer lowers its price below its average variable cost of production, or sets its prices between average variable and average total cost, with an intent to eliminate a competitor.

(b) Monopoly pricing, where a company prices its products with no relation to costs or the likely reaction of competitors and obtains 'excessive' profits.

(c) Discriminatory prices – charging different prices to different customers without any cost justification for the difference, e.g. a pricing structure under which ex-factory sale prices of products vary depending on the Member State to which they are ultimately sold.

(d) Unfair, anticompetitive or discriminatory terms or conditions such as arrangements whereby a purchaser of a product (hardware) is obliged to purchase from the dominant supplier unrelated products (other add-on hardware, or software, or maintenance services, or a complete range of other products).

- (e) Restrictions on resale.
- (f) Refusal to deal, e.g., refusal by a dominant supplier to continue to deal with a long-standing customer for no objective reason.

**12.3.4.2 British Telecommunications** The European Court of Justice had occasion to consider the position of British Telecommunications at the time when it was a statutory corporation. A complaint was lodged with the European Commission by Telespeed,<sup>66</sup> which wished to take advantage of lower tariffs in the UK than in other parts of Europe. Before the formation of BT, the Post Office had incorporated in its standard terms of service certain restrictions on re-forwarding messages in this way. The Commission held that BT held a statutory monopoly at the time, and was therefore in a dominant position. In addition, the refusal to permit message re-forwarding services was considered to be an abuse.<sup>67</sup>

**12.3.4.3 IBM** Although it was never finally decided, the Commission has alleged that IBM was in a dominant position under art. 86. The allegation related to the market for IBM's System/370 central processing units and operating system. The allegation was made that the dominant position in relation to those two products allowed IBM to control the market for the supply of compatible products. The allegations of abuse involved:

- (a) Failure to supply other manufacturers with interface information.
- (b) Not offering System/370 central processing units without a capacity of main memory included in the price (memory tying or memory bundling).
- (c) Not offering System/370 central processing units without basic software included in the price (software tying or software bundling).
- (d) Discriminating between different users of IBM software, i.e., refusing to supply certain software installation services to users of non-IBM central processing units.

The Commission eventually accepted IBM's undertakings in relation to these issues, and in particular in relation to interface information and memory bundling.

The IBM proceedings<sup>68</sup> are an illustration of the Commission's general approach to defining markets in very narrow terms. From this approach, it is possible that:

- (a) a relevant market may be very narrowly defined in terms of a manufacturer's own products; and
- (b) a hardware manufacturer may find itself in a dominant position over the supply of interrelated software, e.g., interface information.

66. *Italy v Commission* (case 41/83) [1985] ECR 873.

67. OJ No. L 360, 21 December 1982, p. 36.

68. *International Business Machines Corporation v Commission* (case 60/81) [1981] 3 CMLR 635, [1984] 3 CMLR 147.

Particular care will need to be taken in marketing and pricing policies which might be regarded as abusive.<sup>69</sup>

**12.3.4.4 Magill** The motive behind the particular method chosen to enforce intellectual property rights is important, as can be seen from the Commission's decision in *Magill TV Guide/ITP, BBC and RTE*.<sup>70</sup> Here the defendant television companies used copyright in their programme listings to prevent Magill from publishing a weekly programme guide for Ireland. Copyright in these listings had already been established, and the defendants were granted an injunction against Magill. The Commission also found a history of taking similar action against other intending publishers of weekly guides.

The Commission held that the companies were in a dominant position with regard to their programme listings (a very narrow market definition), and that by enforcing their copyright in this manner they were abusing that position. The defendants argued that their current policies of licensing only same-day publication was necessary to ensure that all their programmes were adequately listed, but the Commission rejected this submission, noting that the same effect could be produced by conditions in any licences to publish weekly listings, and that in practice none of the defendants were willing to grant such licences.

[The] Commission concludes that the current policies and practices of ITP, BBC and RTE in relation to their respective advance weekly listings are intended to protect and have the effect of protecting the position of their individual TV guides, which do not compete with one another or with any other guides. . . . By limiting the scope of their licensing policies so as to prevent the production and sale of comprehensive TV guides . . . they restrict competition to the prejudice of consumers.

The case has been affirmed by the Court of First Instance of the EC on substantially the same grounds,<sup>71</sup> and that judgment has reiterated the principle that EC competition law prevails over the national rights to exploit intellectual property:<sup>72</sup>

. . . while it is plain that the exercise of the exclusive right to reproduce a protected work is not in itself an abuse, that does not apply when, in the light of the details of each individual case, it is apparent that such right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of article 86. In that event the copyright is no longer exercised in a manner which corresponds to its essential function, within the meaning of article 36 of the Treaty, which is to protect the moral rights in the work and

69. A legitimate business objective such as the leveraging of software sales via a strong presence in hardware may amount to an abuse. Also, arbitrary refusals to license intellectual property rights may constitute an abuse (*Volvo AB v Erik Veng (UK) Ltd* [1989] 4 CMLR 122).

70. OJ No. L 78, 21 March 1989, p. 43.

71. *Independent Television Publications Ltd v Commission* (case T-76/89) [1991] 4 CMLR 745.

72. [1991] 4 CMLR 745, at pp. 767-8 (emphasis added).

ensure a reward for the creative effort, while respecting the aims of, in particular, article 86. In that case, the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevails over any use of national intellectual property law in a manner contrary to those principles.

This case is an example of the relationship between competition law and copyright. If a software house were to claim copyright in data formats and exercise it to retain a *de facto* monopoly position, art. 86 would provide competitors with a possible line of defence. The case is presently on appeal to the European Court of Justice. Although the basic principles are well-established and are unlikely to be overturned, the Commission's application of the law is likely to be clarified by the European Court of Justice.

**12.3.4.5 Recent Developments** A series of recent cases on the application of art. 86 confirm an underlying trend; the Commission will narrowly define markets to create more open markets and foster the increase of competition. In *Porto di Genova* (case C-179/90 unreported), a dominant position was found to exist over harbour operations in the port of Genoa. Failure to provide adequate unloading services was then characterised as an abuse of a dominant position. (See also *Tetra Pak*; OJ 1992 L72/1 for a recent example of narrow market definition.) A narrow market definition will probably be adopted where the Commission perceives that a business holds an essential resource which is necessary for the development of new entrant competition. This is known as the concept of an 'essential facility'. The Commission took such an approach to market definition in its recent application for interim measures in the *B & I* case (Press Release IP(92)478; 11.6.92) and is understood to be taking a similar approach to slot allocation in the airline industry. The *Magill* case may also be an example of this approach. By defining markets in terms of essential facilities, the Commission could characterise interface information as the market, as it did in *IBM*, and require interconnection. Any arbitrary or discriminatory refusal to interconnect could otherwise be regarded as an abuse. This could lead to more open markets but is likely to cause considerable difficulties for the major computer and communication companies.

## 12.4 SANCTIONS AND REMEDIES

If an agreement infringes art. 85(1) or conduct is an abuse under art. 86, the agreement will be void and the Commission is entitled to impose fines of up to 10 per cent of the combined group worldwide turnovers of the companies concerned.

The scope of invalidity is a matter for national law. Under English law, the doctrine of severance would apply to cut out or 'blue-pencil' the restrictive provisions in the agreement. The court would then be required to decide whether the resulting agreement is one the parties should be held to perform or whether the restrictions are fundamental and strike the heart of the agreement. It is likely that clauses which are of considerable commercial

importance, such as exclusivity, would, if found to infringe art. 85(1), be struck out and the resulting agreement may be rendered unenforceable. In a technology transfer, this risk of unenforceability is probably of more serious commercial concern than the risk of fines.<sup>73</sup>

There is limited precedent<sup>74</sup> to support an action for damages for breach of EC law. A third party which has lost business as a consequence of a restrictive agreement might wish to take such action.

Recently, the Commission has encouraged individuals affected by anti-competitive practices or abuses of dominant positions to take actions in national courts. However, an effective and perhaps cheaper remedy is to lodge a complaint with the Commission where infringement of the rules is suspected. The Commission has very wide search and seizure powers which may be used to establish the truth of the complaint.

Breaches of Member State obligations may entitle an individual to damages where that breach has resulted in loss. A Member State's failure to comply with art. 30 or art. 59 or even its failure properly to implement a Directive, may also form the basis for a damages action in a national court.<sup>75</sup>

73. See also *Irish Aerospace (Belgium) v Euro Control* (10 June 1991 unreported).

74. *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 1390.

75. *Francovich, Bonifaci v Italy* (cases C60/90 and C91/90), *The Times*, 20 November 1991.