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Selective Distribution

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Abstract

Systems of selective distribution involve essentially two elements. First, the distribution does not supply every dealer, retailer, or wholesaler who is willing to sell the products in question. Only those who meet certain criteria are appointed as authorized retailers or wholesalers. Second, authorized dealers may sell only to other authorized dealers, or, in the case of retailers, to users. It is usual to classify the criteria for selecting the dealers to be approved as follows: 1) Qualitative and Quantitative Criteria; 2) Objective and Subjective Criteria; 3) Technical Qualifications and Commercial Qualifications. There may of course be obligations, including restrictive obligations, in a selective distribution agreement that are not selection criteria or requirements. Many obligations are not really criteria for selection of dealers, although they exclude dealers who are unable or unwilling to accept them, and are not confined to selective distribution agreements. It will be seen that the distinctions between qualitative and quantitative criteria, and between objective and subjective criteria, although helpful, are not rigid distinctions. Some consequences of this important fact are discussed below.

SELECTIVE DISTRIBUTION

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INTRODUCTION

Systems of selective distribution¹ involve essentially two elements. First, the distribution does not supply every dealer, retailer, or wholesaler who is willing to sell the products in question. Only those who meet certain criteria are appointed as authorized retailers or wholesalers. Second, authorized dealers may sell only to other authorized dealers, or, in the case of retailers, to users.

It is usual to classify the criteria for selecting the dealers to be approved as follows:

- 1) Qualitative and Quantitative Criteria: Qualitative criteria relate to the technical or other requirements demanded or obligations imposed on the dealer which are unrelated to the number of approved dealers in the state or the region concerned. Quantitative criteria limit, and are intended to limit, the number of dealers approved in the particular state or region, even if there are other dealers present who fulfill equally well all the qualitative criteria. The basis for quantitative criteria may be the size of the region to be covered by the dealer, its popula-

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1. See generally Burst & Kovar, *Distribution Selective et le Droit Communautaire de la Concurrence*, 31 *REVUE TRIMESTRIELLE DE DROIT COMMERCIAL* 459 (1978); Canenbley, *Antitrust Problems with Regard to Distributing Under the Laws of the EEC*, 5 *INT'L BUS. LAW* 177 (1977); Chard, *The Economics of Exclusive Distributorship Arrangements with Special Reference to EEC Competition Policy*, 25 *ANTITRUST BULL.* 405 (1980); Frignani, *Selectives Vertriebssystem in der EWG: Eine Falsch Ausgelegte und Schlecht Geloste Frage*, 28 *WIRTSCHAFT & WETTBEWERB* 365 (1978); Gijlstra & Murphy, *Distribution Systems and EEC Competition Law: The Law as it Stands*, 1 *LEGAL ISSUES EUR. INTEGRATION* 81 (1976); Hootz, *Freistellung Selektiver Vertriebssystem Nach EWG—kartellrecht*, 24 *RECHT DER INTERNATIONALEN WIRTSCHAFT* 108 (1978); Osterveil, *Developing EEC Antitrust Law in the Field of Distribution Under Article 85 of the Treaty of Rome*, 8 *LAW & POL. INT'L BUS.* 77 (1976); Piriou, *Distribution Selective et les Regles Communitaires de Concurrence*, 14 *REVUE TRIMESTRIELLE DE DROIT EUROPEAN* 602 (1978); Salzman, *Analogies Between United States and Common Market Antitrust Law in the Field of Distribution*, 13 *INT'L LAW.* 47 (1979); Vajda, *Selective Distribution in the European Community*, 13 *J. WORLD TRADE L.* 409 (1979); Note, *EEC—Article 85—Selective Distribution Agreements May Not Include Prohibition on Exports*, 10 *GA. J. INT'L & COMP. L.* 673 (1980).

tion, or its wealth, or the number of potential customers or potential sales estimated in some other way.

- 2) Objective and Subjective Criteria: Objective criteria are explicit and reasonably precise criteria capable of being applied by any person who is aware of their terms and of the dealer to whom it is proposed to apply. Subjective criteria are often not explicit, or if explicit are so vague or so dependent on the attitudes of the person applying them that it is difficult to decide whether they are met by a given dealer or not.
- 3) Technical Qualifications and Commercial Qualifications: Technical qualifications may be required if customers want technical advice or after sales services which can be provided only by technically qualified staff. Commercial qualifications are usually expressed as obligations, for example, to a minimum stock, or to have a minimum turnover.

There may of course be obligations, including restrictive obligations, in a selective distribution agreement that are not selection criteria or requirements. Many obligations are not really criteria for selection of dealers, although they exclude dealers who are unable or unwilling to accept them, and are not confined to selective distribution agreements.

It will be seen that the distinctions between qualitative and quantitative criteria, and between objective and subjective criteria, although helpful, are not rigid distinctions. Some consequences of this important fact are discussed below.

In any selective distribution system involving quantitative criteria, there are likely to be unexpressed subjective criteria in practice.² This occurs when the manufacturer or distributor making the selection is compelled to choose between two or more dealers who are all qualified according to the nonquantitative criteria, but only one, or few, of whom the manufacturer or distributor proposes or is free under the quantitative criteria to appoint. The manufacturer may choose the dealer who best meets the nonquantitative criteria. Or he may act on other considerations such as location of premises, membership in a trade association, established reputation, or willingness to

2. Sharpe, *Refusal to Supply*, 99 *LAW Q. REV.* 36 (1983)(correctly stressing that long term relationships between manufacturers and dealers include much more than the terms of the contracts involved).

maintain prices. The basis on which the manufacturer or distributor chooses between apparently equally qualified dealers may be extremely important, but is often not expressly stated anywhere.

A series of exclusive distributorship and dealership agreements, at wholesale and retail level, may appear similar to a selective distribution system. However, they differ in three ways. First, exclusive agreements do not normally include a prohibition on resale to unauthorized dealers, otherwise they would need an individual exemption. Second, exclusive agreements restrict competition within the meaning of article 85(3) of the Treaty establishing the European Economic Community³ (EEC Treaty) only on strictly limited conditions set out in Regulation 67/67⁴ or under article 85(3) if they are associated with territorial protection or with resale price maintenance.

I. ADVANTAGES OF SELECTIVE DISTRIBUTION

The nature of the advantages obtained by the manufacturer or distributor from qualitative criteria depend on the terms of the criteria applied or the obligations imposed. Where the dealer is expected to have technical qualifications or to maintain technically qualified staff, the manufacturer may benefit from the assurance that the dealer will be able to provide advice and after sales service to his customers. Even where no such advice or service is required or even possible, the manufacturer, particularly of luxury or prestige products, may for presentational reasons wish his products to be sold only by sales representatives with a certain training and perhaps appearance. Similarly the manufacturer may wish his products to be sold only from trading premises at which cer-

3. Mar. 25, 1957, art. 85(3), 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II)(official English translation), 298 U.N.T.S. 3 (unofficial English translation) [hereinafter cited as EEC Treaty].

4. 10 J.O. COMM. EUR. 849 (1967), 1 COMMON MKT. REP. (CCH) ¶ 2727. Regulation 67/67 came into force on May 1, 1967. Its duration was initially limited to December 31, 1972, but was later extended to June 30, 1983 by Regulation No. 2591/72, 15 J.O. COMM. EUR. (No. L 276) 15 (1972), 1 COMMON MKT. REP. (CCH) ¶ 2728.01 and Regulation No. 3577/82, 25 O.J. EUR. COMM. (No. L 373) 58 (1982), 1 COMMON MKT. REP. (CCH) ¶ 2728.01. It has recently been replaced by Regulation No. 1983/83, 26 O.J. EUR. COMM. (No. L 173) 1 (1983), 3 COMMON MKT. REP. (CCH) ¶ 2730. See Schröter, *The Application of Article 85 of the EEC Treaty to Exclusive Distribution Agreements*, 8 FORDHAM INT'L L.J. 1 (1984).

tain technical equipment or facilities are available, or where the surroundings have the atmosphere that he thinks best for selling his product, without involving the manufacturer in vertical integration.

Such requirements may be called technical or presentational criteria or qualifications. What are called "commercial qualifications" are often expressed in quantitative terms, and are really obligations imposed on the dealer, e.g., to maintain a stock of a certain size or variety, to achieve a minimum turnover, to engage in a certain amount of advertising or other promotional activity, and to keep certain records. The advantages of such commercial qualifications for the manufacturer are that he is assured a certain minimum demand for the products in question through a limited number of outlets, and that customers may have a larger selection of his products available to them on the dealer's premises than the dealer might otherwise think it worthwhile to maintain. The manufacturer, therefore, may get certain modest benefits in planning his production and the marketing of his products at the point of sale, the maintenance of the reputation of his brand and, in the case of technical qualifications, an assurance of adequate services to the users of his products.

In the case of a product of which supplies are limited, the dealer may perhaps get an assurance of rather more secure supplies than would be the case without a selective distribution system. More important, he is likely to benefit, in practice, from a rather higher profit margin than he would have otherwise. Specialized dealers may benefit from being free from competition from large scale nonspecialized outlets which, if the distribution system were nonselective, could often sell the goods more cheaply, perhaps without providing services. The consumer or user may benefit from the availability of technically qualified advice and after-sales service where these are necessary, and sometimes the convenience of having a nearby outlet in an area where an outlet would be uneconomical if the number of outlets in neighboring areas was unlimited.

Whether and to what extent any of these advantages are realized in fact in any given selective distribution system will depend entirely on the circumstances. How far factor allocation and economic efficiency is optimized by limiting outlets and thereby tending to increase the return on the dealers' capi-

tal will also depend entirely on the circumstances. Of course selective distribution agreements may also contain a wide variety of other clauses which may restrict intrabrand or interbrand competition but which are not caused by or directly related to the selective nature of the distribution system in which they occur. Except in the case of presentational requirements for luxury products, the essence of the argument for selective distribution is that the dealers are asked to make an investment, in specialized knowledge or in staff, premises, or equipment, to sell the goods, and selectivity is intended to give them an assurance that their investment will be profitable.

However, selectivity is not a sufficient condition for profitability because it does not in itself give the dealer immunity from parallel imports or from interbrand competition. Nor is it a necessary condition for profitability; low prices to dealers, or resale price maintenance, if it were lawful, would provide much the same assurance. Nor is selectivity in itself sufficient to ensure that dealers make the investment desired: specific obligations must be imposed. In practice, even quantitative criteria are often not related, except in the most vague and general way, to the cost of the investment that the dealer is required to make.

The best course of action is for the manufacturer to specify in detail what he requires the dealers to provide, and to oblige himself to apply these requirements in a nondiscriminatory way, which it is in any case normally required to do. The cost of providing whatever is necessary can be estimated, and dealers who do not think it is profitable to provide it will not enter the system. The dealers may then be entitled to an assurance that the calculations they have made will not be upset by the appointment of additional dealers unless this is justified by an expansion of the market. However, the calculations must in any case be liable to be upset by parallel imports and interbrand competition, and to be valid may often assume a certain degree of stability both of buying and of resale prices.

The economic effects of selective distribution and of resale price maintenance are often similar.⁵ Sometimes resale price maintenance is defended on the grounds that it is a substitute for, or a necessary supplement to, specific obligations

5. Sharpe, *supra* note 2, at 43-45, 64.

imposed on dealers. The argument is that unless dealers are assured substantial profits they will not make, or will not accept the obligation to make, the investment which the manufacturer wishes them to make. This may be the real purpose of many selective distribution systems. However, if manufacturers disguise resale price maintenance measures as selective distribution, they will confuse the arguments for what they are doing, and they will cause their agreements to become void, and make themselves liable for fines, as soon as they try to use their selective distribution agreements for, or to supplement them with, resale price maintenance measures.

It follows that it may often be necessary to look at the real aims and needs behind a selective distribution agreement, not at the reasons put forward for it. This must be done in the context of the Common Market as a whole, and the parties must be able to explain how parallel imports from other member states fit into what they are trying to do.

There are various kinds of products for which before-sales or after-sales services may be thought advantageous. If these services are provided by dealers, there may be nonprice competition in respect of those services. It is, however, hard to see any justification for the suggestion that intrabrand nonprice competition in respect of these services is, or could be, more important than intrabrand price competition. The services may be necessary in order to enable the dealers to compete. But they are not the main way, and they should not become the only way, in which they do compete. In any case, if the number of dealers is limited, it is unlikely that intrabrand competition between them in services will be very vigorous.

II. *DISADVANTAGES OF SELECTIVE DISTRIBUTION*

By definition a selective distribution system involves fewer outlets than would exist if the system was nonselective. Whether the number of approved dealers is only marginally less than, or is a tiny proportion of, the number of dealers who otherwise would exist depends on all the circumstances. A substantially reduced number of outlets in a given region may undesirably restrict the choice conveniently available to consumers, and reduce intrabrand price and other competition.

Quantitative criteria necessarily impede market entry by new dealers and by new types of retail outlets such as supermarkets.

Selective distribution systems greatly facilitate pressure both on manufacturers and approved dealers to act, or not to act, in certain ways. In particular, these systems put pressure on dealers and manufacturers not to reduce their resale prices, not to buy parallel imports, not to sell outside their territories, or not to sell competing brands. Pressure can be imposed by reducing supplies, restricting credit, or threatening to refuse supplies or actually doing so, or in other ways. At Community level a series of national selective distribution systems may maintain prices at significantly different levels in different member states, because they greatly inhibit sales between dealers in different member states.

The disadvantages of selective distribution systems are of two kinds: those that result inevitably from the reduced number of outlets, and those which result from the incentives and opportunities given by a selective system. It may be argued that selective distribution normally restricts only intrabrand competition, and that vertical restrictions on intrabrand competition are less serious than horizontal restrictions and restrictions on interbrand competition.

Nevertheless, there are a number of other issues to consider. First, selective distribution inhibits price competition, which is, or ought to be, the most important kind of competition in most consumer markets. Second, a series of vertical restrictions may have the same economic effects as a horizontal restriction between dealers. Third, insofar as selective distribution inhibits price competition, it necessarily reduces interbrand competition. Fourth, if all or most of the manufacturers in a given sector operate selective distribution systems, they will tend substantially to reduce interbrand competition and they will facilitate horizontal restrictions on price competition between dealers, or between manufacturers, or both. Fifth, selective distribution systems have the effect of confining dealers to their own member states and preventing sales of trade quantities across intra-Community frontiers which alone could reduce differences in price levels between member states. These price differences are often much greater than the differences in price within any one member state, and therefore it is particularly important in the interests of Community users and con-

sumers, that competition should be free to reduce or eliminate them.

Clearly, while selective distribution systems may have worthwhile effects, few generalizations can be made about them: their effects depend on the circumstances, and cannot be deduced merely from the terms of the agreements themselves.

Selective distribution systems limit market entry by manufacturers of competing products, if each distributor is free to sell only one manufacturer's products. If all existing suitable dealers are bound by exclusive arrangements, a new manufacturer may be unable to enter the market without setting up his own dealers. Sometimes, even if the existing dealerships are not formally exclusive the dealers are reluctant to sell competing products, especially imported products, and it may be uneconomic for a dealer to sell only the imported products and not domestic ones; for example, newspapers, as in *Salonia v. Poidomani*.⁶

The extent of the effects on intrabrand and interbrand competition resulting from a selective distribution system varies greatly. Partitioning of the Common Market almost always has a substantial effect on competition. Resale price maintenance usually does so. On the other hand, whether quantitative criteria significantly affect consumer choice, intrabrand competition or market entry by dealers depends on the circumstances. It is possible to imagine circumstances in which a relatively small number of large dealers could provide more effective intrabrand competition than a large number of small outlets, although it is doubtful whether this often occurs in practice.

III. DEALERS' KNOWLEDGE OF THE SELECTION CRITERIA

A distribution system may be selective even if it is not so described in the distribution agreements between the manufacturer or distributor, and the dealers, even if there are no written agreements setting out the selection criteria. Whether a given distribution system is selective depends first on how the manufacturer or distributor acts in practice in deciding

6. 1981 E. Comm. Ct. J. Rep. 1563, 1579, 1588, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8758, at 9100, 9105-06.

how many and which dealers to appoint, and secondly on whether it is part of the understanding between the dealers and the manufacturer that the number of dealers will be limited. It is not necessary, for article 85(1) to apply, that the dealers know all the details of the selection criteria used by the manufacturer, or that the criteria themselves be the subject of any agreement with the dealers, or even that there be an understanding that the criteria may not be changed without notice to the dealers.

In selective distribution systems it is common for a certain discretion to be reserved to the manufacturer, either expressly or de facto, even if it is only for the purpose of allowing him to choose freely which of several similarly qualified dealers he will appoint. The fact that the manufacturer is practicing a selective system, must be known to the dealers, even if the details of the selection criteria were not made clear to them, since they would be prohibited from selling to nonapproved dealers. Once it is shown that it is part of the basis on which the dealers entered into or maintained their agreements with the manufacturer that there would be some restrictions on the number of dealers appointed in the future, that is sufficient to show that the restrictions, whatever they may be exactly from time to time, are part of the overall arrangements.

The dealers do not need to know that the criteria are quantitative for article 85(1) to apply. At first sight it would seem unfair that article 85(1) might apply to their agreement without their knowing it, or as a result of the action of the other party to the agreement. However, this does not withstand consideration. First, if the dealers know that selection criteria are being used, the criteria must, in principle, be either quantitative or qualitative. Even if they are qualitative, as is shown below, they may have quantitative effects, and so may come under article 85(1). Therefore even if the dealers know that the criteria were formally qualitative, they could not be certain that the criteria were immune from article 85(1).

Second, it is surely a principle of law that a person entering into an agreement cannot put himself in a better position by not ascertaining its terms, or the terms of anything referred to in it, than he would be if he found them out correctly and in detail. Third, in almost all selective distribution systems the manufacturer retains some discretion. The way that discretion

is exercised may affect the legal position of the system under article 85(1). But if the dealers have accepted, even imprecisely, an arrangement under which the manufacturer has retained a discretion which may alter the legal position of the agreement, they cannot claim to be unaffected by the exercise of a discretion which allowed the manufacturer to use quantitative criteria when he chose to do so. Of course it might be wrong to fine the dealers for unlawfulness due to the acts of the manufacturer rather than their own acts, and of course in practice much may depend on questions of evidence. But in principle it seems clear that article 85(1) may apply even if the dealers cannot be proven to have known that the criteria being applied by the manufacturer included quantitative criteria.

Fourth, in any selective distribution system the approved dealers are prohibited from selling to nonapproved dealers. This is in itself always a restriction on competition, except in the unusual case in which there is some noneconomic necessity which makes sales by nonapproved dealers seriously undesirable, as in the case of pharmaceutical products which may be sold only on a doctor's prescription. Approved dealers must be aware of any such prohibition, and therefore are aware that the agreement may fall under article 85(1) unless the selection criteria, whatever they may be exactly, can be justified.

A somewhat similar issue arises in connection with unilateral action by a manufacturer which may make a restrictive agreement ineligible for exemption under article 85(3). It is clear that unilateral interference with parallel imports may have that effect, as article 3 of Regulation 67/67 shows. However, the innocent party to an agreement that becomes invalid due to the action of the other party may have a right to be indemnified by the other party against any loss he suffers as a result.

IV. *QUALITATIVE CRITERIA*

Qualitative criteria do not necessarily restrict competition. However, even objective criteria of a qualitative nature may restrict competition if they exceed the requirements of an appropriate distribution of the products, i.e., if they are unnecessa-

rily strict.⁷ For example, if dealers were obliged by a manufacturer to have highly trained staff even if the dealers rarely supplied technical services or advice to users, or if the product did not require them, the requirement would restrict competition. Where requirements are imposed for presentational or prestige reasons it is less easy to judge whether the requirements are reasonable or not (indeed they may hardly be "objective") but clearly they restrict competition if they go further than is genuinely necessary, as in practice they usually do if they have any significant effect. The question thus is not whether the agreement obliges the dealers to provide services, but whether it is technically necessary, given the nature of the product, that they should provide them.

Criteria which appear to be qualitative may, and often do, have quantitative effects, even if they are not expressed or even intended to do so. For example, commercial requirements such as the obligation to maintain a minimum stock or to stock

7. Metro SB-Grossmarkte GmbH v. Comm'n, 1977 E. Comm. Ct. J. Rep. 1875, 1904-05, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7868; see L'Oreal N.V. v. De Nieuwe A.M.C.K., 1980 E. Comm. Ct. J. Rep. 3775, 3791, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8715, at 8607 (holding that it may be necessary to consider whether the characteristics of the product require a selective distribution system to preserve its quality and ensure its proper use, but that the criteria may not go beyond what is necessary); see also Hasselblad v. Comm'n. 1984 E. Comm. Ct. J. Rep. 883, 3 COMMON MKT. REP. (CCH) ¶ 14,014, at 14,187-88; AEG-Telefunken v. Comm'n, 1983 E. Comm. Ct. J. Rep. 3151, 3194-95, 3 COMMON MKT. REP. (CCH) ¶ 14,018, at 14,258; Salonia v. Poidomani, 1981 E. Comm. Ct. J. Rep. 1563, 1580-81, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8758, at 9101. In Van Landewych v. Comm'n, 1980 E. Comm. Ct. J. Rep. 3125, 3265, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8687, the European Court of Justice (Court), in reply to an argument based on the Metro Grossmarkte judgment, stressed that the latter concerned a system "conceived . . . for the purpose of distributing highly technical, durable consumer goods so that traders had to be selected on the basis of qualitative criteria." *Id.*; see BMW, 18 O.J. EUR. COMM. (No. L 29) 1, 4-5 (1975), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9701, at 9539-7 to 9539-8; see also Junghans, 20 O.J. EUR. COMM. (No. L 30) 10 (1977), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9912; SABA, 19 O.J. EUR. COMM. (No. L 28) 19 (1976), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9802; Omega, 13 J.O. COMM. EUR. (No. L 242) 22 (1970), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9396; Kodak, J.O. COMM. EUR. (No. L 147) 24 (1970), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378. One author states that "to be meaningful, qualitative criteria must have a quantitative effect." Chard, *The Economics of the Application of Article 85 to Selective Distribution Systems*, 1982 EUR. L. REV. 83, at 97. The Commission has never denied this. He also points out, correctly, that minimum turnover requirements have quantitative effects. *Id.* at 98.

the entire range of the manufacturer's products, may impose costs on the distributor which make it uneconomic for more than one dealer in a given region to accept them. Similarly, a minimum turnover obligation may be set at a level such that not all the dealers who fulfill the qualitative requirements of the distribution arrangements would be able to achieve it, and if so it has quantitative effects.⁸ Even apparently technical requirements such as the obligation to have technically trained staff, or, in the case of cars, to maintain a twenty-four hour repair service, may have quantitative effects, since only large dealers with a substantial volume of business may find it economic to accept them. If apparently qualitative criteria or obligations have quantitative effects in practice, the dealers' obligations to fulfill these criteria restrict competition within the meaning of article 85(1).

Similarly, presentational requirements such as the obligation to sell only in premises of a certain minimum size or only if a certain minimum floor area is devoted to displaying the products concerned, have quantitative effects if not all the dealers who fulfill the qualitative requirements can economically provide premises or display areas of the size in question. Presentational requirements such as the criterion that luxury products should be sold only through retail outlets of the highest standing may have quantitative effects even if they are imprecise and incapable of being objectively applied.

Whether apparently qualitative criteria have significant quantitative effects cannot be judged from the terms of the criteria themselves, even assuming they have been made explicit, but can only be assessed in the light of the surrounding circumstances. One cannot decide whether a requirement to achieve a given minimum turnover has quantitative effects until one knows, by reference to the current aggregate volume of sales in the region, how many of the dealers who fulfill reasonable requirements could be expected to achieve the minimum. Whether a given requirement has quantitative effects, and the extent of those effects, may vary over time for a given manufacturer, and may be different for different manufacturers of competing products in a given region and at a given time.

8. *L'Oreal v. De Nieuwe A.M.C.K.*, 1980 E. Comm. Ct. J. Rep. 3775, 3791 [1979-1981 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8715, at 8607.

The quantitative effects of an obligation to maintain a minimum stock or to stock the manufacturer's entire range may be altered if the manufacturer increases the minimum stock requirement or significantly expands his range of goods, or even if he puts up the prices he charges to dealers for the same goods. Quantitative effects may even be altered by changes in the credit terms on which the dealers are supplied by the manufacturer, since if these are generous they will reduce the cost to the dealer of carrying the required stocks. If the terms on which credit is available to the dealers, whether from the manufacturer or from financial institutions, alter as a result of changes in interest rates, the quantitative effects of a given stock requirement may also alter.

Even when the product is technologically complex, it cannot be assumed that only technically qualified dealers should sell it, since the dealers do not necessarily give or need to give either technical advice or repair and maintenance services. Dealers do not necessarily check that each item is in all respects in working order when they sell it, even if the manufacturer's checking procedure cannot be relied on because the goods might have been damaged in transit. But there may of course be economies of scale in stocks of spare parts and in carrying out repair and maintenance services, which may make it appropriate for only dealers to carry out those services. The European Court of Justice (Court) in *Metro-Grossmarkte GmbH v. Commission* said that selective distribution was compatible with article 85(1)

provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.⁹

The Court does not seem to have meant that qualitative criteria could only relate to technical qualifications and suitability of premises, although the Court may have had in mind that

9. *Salonia v. Poidomani*, 1981 E. Comm. Ct. J. Rep. 1563, 1580, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8758, at 9101; *Metro SB-Grossmarkte GmbH v. Comm'n*, 1977 E. Comm. Ct. J. Rep. 1875, 1904, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7868.

most other qualitative criteria are likely to have quantitative effects. But the Court should not be regarded as having implied that a requirement that a dealer should maintain sophisticated testing machinery, for example, could never be regarded as qualitative.

The rule that even qualitative criteria are nonrestrictive, provided they are necessary, only if they are both laid down and applied uniformly is extremely important. Qualitative criteria may not be supplemented by additional unexpressed criteria or preferences. The manufacturer may not in practice apply the qualitative criteria in such a way as to disqualify dealers who have been exporting, importing, selling competing products or reducing prices, or doing anything else of which the manufacturer may disapprove.

It also means that if a manufacturer does not lay down the same qualitative criteria in all member states, or does not apply them uniformly, the manufacturer must prove that the differences are justified by objective differences between the situations in the different member states. Member states may not be treated as separate or watertight compartments for the purpose of considering whether the application in practice of qualitative criteria is uniform and nondiscriminatory. Selective distribution arrangements must always be looked at in the context of the Common Market as a whole.

In one of the *Perfume* cases the court stated that “[i]n principle a selective distribution network admission to which is made subject to conditions going beyond simple, objective qualitative criteria falls within the prohibition laid down in Article 85(1), especially when it is based on quantitative selection criteria.”¹⁰

V. QUANTITATIVE CRITERIA

Quantitative criteria are those which limit, and are usually intended to limit, the number of dealers appointed, even if there are, or might be in the future, other dealers in the region

10. *Lancôme v. Etos*, 1980 E. Comm. Ct. J. Rep. 2511, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8714; *L’Oreal v. De Nieuwe A.M.C.K.*, 1980 E. Comm. Ct. J. Rep. 3775, 3791, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8715, at 8607; see SSI, 25 O.J. EUR. COMM. (No. L. 232) 1, 22-24 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,408, at 10,893-95.

in question who comply equally well with whatever nonquantitative criteria are being applied. The fact that at a given moment there may be no otherwise qualified dealers in the region in question who are excluded from the system only because of the quantitative criterion does not alter the fact that it is quantitative, meaning its object and effect is to limit the number of dealers who can be appointed in accordance with the terms of the distribution arrangements.

Quantitative criteria are usually intended to ensure that the aggregate profits of each authorized dealer are maintained at a level regarded as sufficient to enable him to provide certain services, or simply to maintain his interest in selling the goods in question. This does not in itself cause unit prices to rise; in theory, it could make it unnecessary for dealers to raise them. But it reduces intrabrand competition, both by reducing the competition between authorized dealers and by restricting market entry, even by dealers who would be willing to buy from authorized dealers if they were free to do so. If there is little intrabrand competition, pressure to improve dealers' performance can come only from the manufacturer, or from interbrand competition. Even if the quantitative criteria are adopted to ensure that dealers can pay for services to customers, the result may be that there is not competition, in each region, in the provision of those services. New market entry can occur only if an existing dealer leaves the system or is taken over by the proposed entrant, in which case there is no net increase in the number of outlets, or if the market, as measured by the criteria, expands.

A requirement, the purpose of which is to try to ensure that the dealer obtains a certain minimum level of aggregate profits, cannot be justified on technical grounds. It certainly cannot be justified if the dealer is not providing significant technical services to customers, or if the cost of providing the services is not the basis for the formula used to determine how many dealers should be appointed. There is very little evidence that such formulae are in fact related to the cost of providing whatever services are provided; if they were, they would have to be revised from time to time. It is not always clear that the higher wages of staff with the technical qualifications expected, or the cost of paying the staff while they attend re-

fresher courses, are related in any real way to the aggregate profit levels aimed at.

A quantitative criterion, the aim of which is to maintain the aggregate profits of dealers, cannot be justified simply on the grounds that it is needed to ensure that dealers have staff qualified to supply these services, since that aim could be achieved directly by qualitative criteria, and the dealers themselves could be left to determine whether, in their particular circumstances, it was economic for them to provide the services in question on the basis required. At most the manufacturer could justify supplying a proposed new dealer with estimates of his probable sales and the profits out of which he would have to pay for the services he would be undertaking to provide, and the probable cost of these services.

Even if a quantitative restriction on the number of dealers can be justified, it does not necessarily follow that it can be justified in combination with a prohibition on resale to nonapproved dealers. If it is important that certain services are available to customers in each region, it does not necessarily follow that every dealer selling the product must provide them. This is answered by arguments about economies of scale, which do not necessarily justify restriction on competition, and by the "free rider" argument that the clever customers would get advice on what model to buy from the authorized dealer, who bears the cost of providing the technically qualified staff, but buy the product more cheaply from another dealer outside the network. However, if the manufacturer sells only to approved dealers then those dealers will sell, if they are not prohibited from doing so, either to consumers or to nonapproved dealers, and sell in each case at a price at which they can obtain a profit which pays for the cost of maintaining qualified staff.

But, it is said, if nonapproved dealers are selling the goods, it will be difficult if not impossible to ensure that they are not buying from approved dealers in other member states where prices are lower. So the argument against allowing approved dealers to sell to unapproved dealers resolves itself into an argument against parallel imports, in precisely the circumstances in which it is important that consumers should be free to benefit from them. Even more important, the argument assumes that approved dealers will not themselves cause the same problem by importing from other lower price states.

If this assumption is right, it can only be due to the existence of some understanding prohibiting approved dealers from buying from one another, or from importing parallel imports, or from selling below the national price levels, or to a practice by which the manufacturer ensures that dealers in low price member states do not receive products suitable for export or quantities adequate for export. Any such understanding would be *prima facie* unlawful and any such understanding or practice would be likely to make unlawful the selective distribution agreements with which it was associated.

Chard says restrictions on cross supplies even between approved dealers may be indispensable if appropriate levels of distributor services vary between member states.¹¹ This is unlikely to be the case with technical services, and he assumes differences in advertising levels. But genuinely necessary additional advertising costs are usually borne by the manufacturer, and if they are paid by it as well, the "free rider" argument vanishes. Manufacturers cannot justify export bans merely by adding to advertising costs.

Rather little critical consideration seems to have been given to the arguments for quantitative commercial criteria. For example, minimum turnover clauses are more restrictive than discounts for buying larger quantities, or for sales above a certain figure, and it is not clear that they are always more effective to help the manufacturer to plan his production.

The argument that restrictions on intrabrand competition are needed to ensure that dealers cover their costs and make a reasonable profit sounds persuasive, but ignores the fact that it is precisely to keep down costs that competition is important.

11. Chard, *supra* note 7, at 92. Chard states that restrictions on sales between *approved* dealers may be necessary to get dealers to invest in after sales services, but gives no explanation. *Id.* at 92-93. I find it difficult to see a legitimate one. He seems to believe that territorial protection greater than inherent in a selective distribution system may sometimes be needed, but gives no indication of what he has in mind and does not explain how a ban on sales between approved dealers would give territorial protection. Some of his paper is taken up with complaints that the Commission did not, in its decision, consider possibilities not raised by the parties and not suggested by a detailed knowledge of the facts. His argument is weakened further by his failure to distinguish between sales to other approved dealers and sales to unapproved dealers, and his failure to explain whether he is considering the situation in one member state or in several. In the circumstances both his conclusion and his criticism of the Commission seem misplaced.

In sectors where all or most manufacturers have distribution arrangements which restrict intrabrand competition, whether selective or not, it is very likely that all dealers are sheltered from competitive pressures to reduce their costs. Competition is necessary at all levels of industry, not only at the level of manufacturers. Since a manufacturer cannot shelter his dealers from interbrand competition or from parallel imports by selective distribution arrangements, and normally cannot lawfully do so in any other way, there may be very little justification for selective agreements that restrict intrabrand competition but cannot ensure that dealers obtain the net profits that are intended.

In some cases there may be technical reasons for prohibiting sales by nonapproved dealers because, it is said, public safety may demand that a car is thoroughly checked by trained staff provided by the dealer before it is sold. This argument, applied to new cars, suggests some lack of confidence in the checking done by the manufacturer. It does not explain a prohibition on sales by approved dealers to nonapproved dealers, since the approved dealers can still check the cars before they sell them, and it entirely ignores the whole field of second hand cars, which are much more likely to be dangerous to the public than new cars.

Sometimes quantitative criteria are based on the relatively short shelf life of the product in question. To avoid wastage and the return of unsaleable goods to the manufacturer, a minimum turnover is required which will be related to the shelf life. Such an argument must be based on factual information about shelf life and frequency and cost of deliveries to dealers, but, if sound, it justifies a minimum turnover requirement and quantitative selection criteria only insofar as they may be needed to ensure the minimum turnover.

In all cases it is for the parties to the selective distribution agreements to show that the criteria for selection of dealers and the ban on sales to nonapproved dealers, both of which are *prima facie* restrictive, are in fact not so because of the characteristics of the product or the distribution system which they make necessary.

VI. *OTHER OBLIGATIONS IN SELECTIVE DISTRIBUTION SYSTEMS: RESALE PRICE MAINTENANCE*

Although, for reasons indicated elsewhere in this paper, resale price maintenance arrangements are often associated with selective distribution systems, obligations imposed on dealers in relation to resale prices cannot be justified by reference to the selective nature of the distribution system. They always restrict competition within the meaning of article 85(1) and if they affect trade between member states appreciably, they must be justified, if they can be justified, only on other grounds. Resale price maintenance might be prompted by the wish to provide dealers with minimum aggregate gross profits, which can explain minimum turnover requirements. But this does not justify it, because it eliminates intrabrand price competition entirely, and because it adds a further and seriously restrictive element to a distribution system which may already be restrictive because of its selective nature. Resale price maintenance is not normally a permissible method of trying to ensure a certain level of minimum profits for dealers.¹²

It is often said that pharmacists are a special case of selective distribution where resale price maintenance is justified, because of the cost to them of having to keep readily available stocks of medicines which may be rarely needed but which, when needed, may be required urgently. Whatever validity this argument may have for the whole business of any individual pharmacist, it does not necessarily justify maintenance of the resale price of any particular manufacturer's products, since nobody sells exclusively the products of one pharmaceutical firm. The argument has to be considered in the context of the pharmacists' entire business for all products, not in the light of one manufacturer's distribution system.

Agreements and concerted practices about resale prices may restrict competition within the meaning of article 85(1), even if the price level to be respected is not precisely defined. A selective distribution system in practice often puts the manufacturer in a position to exert pressure on dealers not to reduce their prices very much, even if there may be no formal

12. AEG-Telefunken, 25 O.J. EUR. COMM. (No. L 117) 15 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,366, *rev'd*, AEG-Telefunken v. Comm'n, 1983 E. Comm. Ct. J. Rep. 3151, 3 COMMON MKT. REP. (CCH) ¶ 14,018.

agreement on fixed or recommended prices. Such pressure is specially likely to arise in practice if the dealer in question is selling parallel imports as well as goods bought from the manufacturer's own outlet in the member state concerned. It is also likely to arise in practice in a member state where resale price maintenance as such is contrary to national law, but where the manufacturer may nevertheless wish to ensure that intrabrand price competition does not go too far. In such circumstances the manufacturer may tolerate a certain amount of price competition, but intervene if the dealer reduces prices to an extent which the manufacturer, or the other dealers in the particular member state, think excessive. This is just as unlawful, assuming the requirements of article 85 are complied with, as formal resale price maintenance, although of course it may well be harder to prove.

In member states in which formal resale price maintenance through manufacturers' price lists or otherwise is prohibited, manufacturers who wish to prevent resale prices from dropping more than a limited extent are likely to combine selective distribution systems with a variety of efforts to prevent parallel imports from reaching significant levels, and with measures to discourage the dealers primarily concerned from reducing their prices, if necessary supplementing the discouragement with threats of refusal to supply, or even with actual cessation of supplies.

One device used by some manufacturers is to make the granting of the manufacturer's guarantee to the ultimate consumer conditional on the goods having been bought at the recommended retail price.¹³ Such a clause penalizes both the dealer who sells below the recommended price and the consumer who buys from him, and seems entirely unjustifiable.

A discussion of the circumstances in which resale price maintenance may be lawful under Community competition law would be outside the scope of these Remarks. It may be enough to state that the fact that a selective distribution system is lawful cannot in itself justify resale price maintenance measures associated with it. Moreover, a selective distribution system which is combined with resale price maintenance is more restrictive than one which is not. Therefore, a notification of a

13. Sharpe, *supra* note 2, at 42-43.

selective distribution system which fails to mention that the system is combined with resale price maintenance measures will not protect the company from fines.

Furthermore, the resale price maintenance measures may not only be unlawful in themselves, if they are the subject of an agreement or concerted practice, but may make the selective distribution system unlawful also, and may do this even if they are unilaterally practiced by the manufacturer. Finally, resale price maintenance in one member state cannot be effective for long if parallel imports from lower price states can occur freely. Thus, if a manufacturer tries to justify resale price maintenance, he almost certainly has to try to justify a ban on parallel imports as well, which he is unlikely to be able to do. If resale price maintenance cannot work without interference with parallel imports, it probably cannot be justified. If I am right in thinking that many selective distribution systems are associated with de facto resale price maintenance arrangements, then these points are important.

VII. RESTRICTIONS ON SALES OUTSIDE THE DEALER'S TERRITORY

Selective distribution agreements often contain clauses prohibiting the dealers from selling outside their territories, or even to customers from outside their territories. Such clauses always restrict competition within the meaning of article 85(1), and are extremely difficult to justify.¹⁴ Clauses, however expressed, obliging the dealers to concentrate their activities within their territory have to be looked at carefully. Like many clauses in selective distribution agreements, and indeed in all agreements, their effect on competition depends not only on their words but on the interpretation given to them, and the

14. The Court said that articles 3 and 85 of the EEC Treaty, *supra* note 3, imply the existence of workable competition, i.e., the degree of competition necessary to achieve the basic requirements and the objectives of the Treaty "in particular the creation of a single market achieving conditions similar to those of a domestic market." *Metro SB-Grossmarkte GmbH v. Comm'n*, 1977 E. Comm. Ct. J. Rep. 1875, 1904, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7868; *see also* *Ciment et Betons v. Kerpen & Kerpen*, 1983 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ 14,043; *Nungesser v. Comm'n*, 1982 E. Comm. Ct. J. Rep. 2015, 2068-70, 2073-74, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8805, at 7544-46; *Salonia v. Poidomani*, 1981 E. Comm. Ct. J. Rep. 1563, 1578, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8758, at 9100.

use made of them, in practice by the parties. Whether an area of primary responsibility clause is a euphemism for a ban on sales outside the territory may depend not only on the attitude of the manufacturer but also on the attitude of other approved dealers.

As in the case of resale price maintenance arrangements in selective distribution systems, restrictions on the freedom of the dealer to sell outside his territory often result from, or are modified in their practical effect by, pressure from the manufacturer, or from other dealers, on a dealer who is thought to be too active outside his allotted area. In particular, pressure is likely to be applied if the dealer is selling outside the member state where he carries on business, and if the price at which it is profitable for him to sell to a parallel importer is significantly lower than the price in the importing state.

Much the same result may be achieved by a manufacturer's policy of selling to each dealer only the quantities which it is thought that he can sell in his territory. If such a policy can be proved, its effect may be similar to those of other "unilateral" policies on the part of the manufacturer, or the dealer agreement itself may oblige the manufacturer to supply only the quantities which he believes the dealer will be able to sell in his territory. Even if the manufacturer cannot always judge precisely what volume the dealer will be able to sell in his territory, the manufacturer will usually be able to ensure, if he wishes to do so, that the dealer does not get stocks sufficient to allow him to export in trade quantities regularly enough to affect the price level in another member state.

Restrictions on sales outside the dealer's territory are most important where there are differences in price levels between member states. In such circumstances two-tier price structures are sometimes adopted obliging the dealer to pay a higher price if he exports.¹⁵ Manufacturers sometimes try to justify this by the "free rider" argument, i.e., that dealers in

15. See *Distillers Co. Ltd. v. Comm'n*, 1980 E. Comm. Ct. J. Rep. 2229, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8613; *Distillers Co.*, 21 O.J. EUR. COMM. (No. L 50) 16 (1978), [1976-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,011; *Pittsburgh Corning Europe—Formica Belgium—Hertel*, 15 J.O. COMM. EUR. (No. L 272) 35 (1972), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9539; *Kodak*, 13 J.O. COMM. EUR. (No. L 147) 24 (1970), [1970-1972 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9378.

the importing, higher price, country incur large advertising costs and it is unfair that dealers elsewhere who incur lower costs take advantage of them. These arguments raise issues outside the field of selective distribution which cannot be considered here. But often the problem could be avoided entirely if the advertising costs, which in a two-tier price structure are anyway borne by the manufacturer in the form of lower prices to dealers, were paid by it directly. A manufacturer cannot justify a two-tier price system amounting to an export ban merely by arranging for advertising expenses in higher price states to be paid by local distributors or dealers when they are being largely borne by the manufacturer.

It may be said that it would be less satisfactory for the manufacturer to pay the advertising costs itself than to have its distributor pay them. The cost presumably being the same whoever pays it or bears it, the real problem is that in some markets promotional expenses are higher than in others. If parallel imports are allowed, whoever pays the higher expenses will get the benefit of its expenditure only if it is the source of the parallel imports also, that is, if it is the manufacturer. Inevitably markets requiring higher promotional expenditure will have to be subsidized by sales elsewhere, and this will lessen the incentive to penetrate them. Clearly, this is not enough to justify an export ban. Different levels of advertising in different parts of one member state are not normally thought to justify territorial protection within that state. These are in any event theoretical comments. In practice, differences in price levels do not seem to be merely equivalent to, and are not primarily due to, differences in advertising costs, and so cannot be justified by reference to them.

While for analytical purposes it is necessary to distinguish between resale price maintenance and interference with exports, in practice they are often merely two ways by which the manufacturer seeks to maintain price levels in higher price member states. They are sometimes both used, if circumstances make that necessary, or manufacturers may use whichever most effectively prevents the competitive influences on prices which the manufacturer dislikes.

VIII. *RESTRICTIONS ON SALES BETWEEN DEALERS AND CUSTOMER RESTRICTIONS*

It is inherent in a selective distribution system that approved dealers are prohibited from selling to nonapproved dealers. That does not mean that such a prohibition is always justified; it merely means that if there is no such prohibition, the distribution system is not the kind normally called "selective." None of the arguments advanced to justify selective distribution systems explain restrictions on sales by one approved dealer to another, whether directly or in the form of an obligation to sell only to consumers, and it is difficult to see on what grounds such a restriction could ever be justified.

The most usual kind of restriction on sales between approved dealers is an export ban. Manufacturers frequently wish to keep their national selective distribution systems in separate compartments, and consider that it would upset their price and other policies in the higher price states if parallel imports were permitted. Sometimes a prohibition on sales between approved dealers is merely a disguised form of ban on exports to other member states. But whatever intention may lie behind a clause prohibiting sales between approved dealers, such a clause always restricts competition within the meaning of article 85(1).

A prohibition on sales between approved dealers is sometimes imposed to protect presales services, usually advertising, at intermediate distribution levels. The wholesaler who advertises, it is said, can recoup his costs only if his retailers do not import from other member states where the price is lower. Once again, the ban on cross supplies turns out to be in reality a ban on imports, maintaining price differentiation, and it must be justified, if possible, as such under article 85(3). In the case of patented or similar products, efforts to provide territorial protection against competition from third parties ("closed" systems) are always contrary to article 85(1)¹⁶ and selective distribution systems are at least equally restrictive in relation to parallel imports by middlemen.

It has already been indicated that restrictions on sales by approved dealers to *nonapproved* dealers restrict competition

16. *Nungesser v. Comm'n*, 1982 E. Comm. Ct. J. Rep. 2015, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8805.

within the meaning of article 85(1) unless they are necessitated by some objective characteristic of the product in question or some genuine necessity for its distribution, as distinct from a commercial preference on the part of the manufacturer.¹⁷

Chard, considering selective distribution agreements primarily in the context of a single member state, does not discuss the economic effects of a ban on sales between approved dealers in different member states with different price levels, although he considers other restrictive effects of bans on sales between approved dealers.¹⁸ He is, however, right to say that whether the market is concentrated is important, not only when assessing bans on cross supplies, but also whether other manufacturers have selective distribution agreements. He is also right to point out that selective distribution arrangements facilitate collusion by dealers, both with other dealers and with manufacturers. This is so when dealers are obliged to inform the manufacturer of the serial numbers of the goods they sell, since this makes it easy to identify the source of parallel imports. Chard is also right to say that bans on sales between approved dealers help manufacturers to charge different prices in different member states. Not only is this particularly important in this situation, but also if parallel imports do not occur on a significant scale, and if the prices charged are proportionately unequal to the seller's marginal costs.

IX. ARE SELECTIVE DISTRIBUTIONS WORKABLE IN ONLY SOME MEMBER STATES?

The next question to be considered is a practical one: Can a manufacturer expect to make his distribution system work in the Community if it is selective in some member states and not in others?

The difficulty may be explained simply. In any state where the manufacturer's distribution system is nonselective, his dealers will be free to sell to nonapproved dealers, including nonapproved dealers in member states where his system is a selective one. They can be prevented from doing this only by an export ban, or the equivalent, or by converting the system

17. *United Brands v. Comm'n*, 1978 E. Comm. Ct. J. Rep. 207, 289, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429, at 7713.

18. See Chard, *supra* note 7.

into a selective one. It seems to follow that a manufacturer cannot expect such distribution arrangements to operate satisfactorily and legally when price levels in the state with the non-selective system are lower than those in the states where the distribution systems are selective.

There is also a theoretical problem. Selective distribution systems are usually defended on the grounds that they are in some sense necessary for the satisfactory distribution of the product. This is difficult to accept if the product is distributed by the same manufacturer in another member state without a selective system. In any case, in most of the industries in which selective distribution is practiced there is at least one manufacturer who distributes its products without having a selective system. Selective distribution systems may be advantageous, but they are rarely necessary.

Other questions arise. It is argued that selective distribution agreements are necessary on various grounds. The validity of these arguments, or their relevance, is called in question if the criteria for selection are significantly different in different member states, or if the criteria are not related, in the light of the circumstances in each state, to the justification suggested.

X. *EFFECTS ON TRADE BETWEEN MEMBER STATES*

Some manufacturers have separate selective distribution systems in each member state, and claim that trade between member states is not affected by any of them, because each is independent of all the others. This argument is rarely, if ever, valid. Each national system must be looked at in its context, and its context includes the manufacturer's distribution systems for the same products in other member states. Dealers in a selective distribution system are prohibited from selling to unapproved dealers, and this prevents them from selling to nonapproved dealers in other member states. Any restrictions on exports by approved dealers necessarily affect trade between member states.

Clauses in selective distribution agreements which tend to keep prices up and to limit or exclude intrabrand price competition tend similarly to create an incentive for goods to flow in from other member states if they are not prevented from doing so. Selective distribution agreements also make it difficult for

a dealer from one country to enter the market in another, although the frontier may only be a few kilometers away. Insofar as selective distribution agreements tend to keep the national markets of member states economically separate from one another, and to maintain different price levels, they automatically affect trade between member states and create incentives for parallel imports. They also make it easy to trace goods back to dealers who are exporting because they are usually combined with obligations to record the serial numbers of goods sold.

It is frequently said that price differences between member states are due to changes in the rates of exchange of their currencies. Such changes alter price levels, but if substantial price differences continue, that can only be due to the absence of effective competition between dealers in the member states. If prices for a given product in one member state remain higher than those in another even when exchange rates fluctuate, some other, protectionist, explanation is to be sought.

XI. SELECTIVE DISTRIBUTION SYSTEMS OF OTHER MANUFACTURERS

The Court has pointed out that structural rigidity of the market would be increased if too many manufacturers had selective distribution systems.¹⁹ This would be particularly undesirable if the market was highly concentrated, or if there was little trade between member states for technical reasons, or if some or all of the manufacturers had resale price maintenance, if it was lawful. Widespread use of selective distribution would make prices rigid and reduce interbrand competition, create barriers to entry into retailing, and make distribution systems inflexible. It would facilitate horizontal collusion between manufacturers, or between dealers, or both. If such horizontal collusion was shown to have occurred, it might be a reason for withdrawing exemption from or refusing exemption for the selective distribution agreements of the parties to the collusion.

19. See *Van Landewyck v. Comm'n*, 1980 E. Comm. Ct. J. Rep. 3125, 3265, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8687, at 8196; *Lancôme v. Etos*, 1980 E. Comm. Ct. J. Rep. 2511, 2536-37, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8714, at 8588; *Metro SB—Grossmarkte GmbH*, 1977 E. Comm. J. Rep. 1875, 1905, [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8435, at 7868; *Sharpe*, *supra* note 2, at 65.

If, on the other hand, all the manufacturers had similar selective distribution agreements and it was found that there was very little competition, it might be necessary for the Commission to insist that they should all be modified.

XII. *ACTION BY MANUFACTURERS NOT EXPRESSLY
CONTEMPLATED BY THE DEALER AGREEMENTS:
TERMINATION OF SUPPLIES AS EVIDENCE OF
RESTRICTIONS ON COMPETITION*

The fact that a restrictive agreement or concerted practice between the manufacturer and dealer in a distribution system is not found in the formal dealer agreement does not, of course, prevent the agreement or practice from falling under article 85(1) if there is other evidence of its existence. This applies to the two restrictive features in a selective distribution system; the limit on the number of dealers appointed and the ban on sale to nonapproved dealers just as much as to other restrictions.

It sometimes happens that after a dealer agreement has been entered into, an occasion arises on which the manufacturer makes it clear that he will not supply the dealer with his products unless the dealer ceases to export, or to buy parallel imports, or to charge reduced prices, or to do something else to which the manufacturer objects. The manufacturer may, in other words, make it a condition of continued supplies that the dealer ceases to behave in a particular way. In such circumstances, whether or not the dealer actually promises not to behave in the manner in question is not particularly important; if he continues to obtain supplies on the basis of the condition stated by the manufacturer, the condition has become a part of the overall arrangements, whether agreement or concerted practice, between the manufacturer and the dealer.

No doubt in such situations it is unlikely that any fine should be imposed on the dealer, who has had to accept an unlawful condition under pressure of having his supplies cut off.²⁰ No doubt also much will depend on the precise nature of the evidence available. But in principle, on appropriate evi-

20. *But see* BMW Belgium S.A. v. Comm'n, 1979 E. Comm. Ct. J. Rep. 2435, 2478, 2496-97, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8548, at 7879, 7890.

dence it should be held that where the manufacturer treats dealers' compliance with his policy as a condition of continued supply to them, by terminating supplies to a dealer because the dealer will not agree to cease the conduct to which the manufacturer objects or otherwise, there is an infringement of article 85. Alternatively it may be appropriate to analyze the situation along the lines explained in the next section.

In practice it is not feasible, at least not more than once or twice, for a manufacturer unilaterally to terminate supplies to a particular dealer on the grounds that the dealer is exporting, importing, or cutting prices, if the manufacturer has never previously indicated that it objects to the conduct in question. The dealers would understandably regard it as unreasonable, and the manufacturer would lose much goodwill. Other dealers would become aware of the risk of being deprived of supplies, and they would either protest successfully or would ultimately accept the manufacturer's policy as a condition of receiving supplies, thereby developing a concerted practice, even if it was one imposed or initiated by the manufacturer. After all, while individual dealers may have an interest in price cutting or importing parallel imports, dealers in general are unlikely to object strongly to the manufacturer taking measures which are likely to, and are intended to, keep prices up.

If a manufacturer with a selective distribution system agreed with any of its approved dealers that it would cut off supplies to any dealer who exported, imported parallel imports, or cut prices, not only would this agreement be unlawful as a boycott but it would be likely to make the selective distribution system itself ineligible for exemption.

XIII. UNILATERAL ACTION BY MANUFACTURERS WHICH MAKES ARTICLE 85(3) INAPPLICABLE

An agreement or concerted practice which falls under article 85(1) is unlawful and void and must be terminated, unless it falls under article 85(3). Whether article 85(3) applies depends on all the surrounding circumstances,²¹ both in the

21. The Court has repeatedly said that in applying article 85 of the EEC Treaty, *supra* note 3, all the surrounding circumstances must be taken into account. *See, e.g.*, *Coditel S.A. Cine-Vog Films S.A.*, 1982 E. Comm. Ct. J. Rep. 3381, 3402, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8865, at 8184-85; *Lancôme v. Etos*,

member state in which the agreement or practice applies, if, as in the case of most selective distribution agreements, it is only between companies in a single state, and in other member states where it has economic effects (normally, in practice, a higher-price market protected by action taken in the context of the agreement in question). A fortiori, it is important to consider the effects of any conduct by any party to the agreement which, even if not contemplated by the agreement, causes the effect of the agreement to be more serious or more extensive than they would otherwise be.

The best known example of this principle is in article 3 of Regulation 67/67. That article renders the group exemption for exclusive distribution agreements inapplicable if

the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the Common Market, in particular where the contracting parties:

- (1) exercise industrial property rights to prevent dealers or consumers from obtaining from other parts of the Common Market or from selling in the territory covered by the contract goods to which the contract relates which are properly marked or otherwise properly placed on the market;
- (2) exercise other rights or take other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract.

Under this article, any action which makes it difficult for parallel importers or consumers to obtain the goods in question from dealers in other member states makes the group exemption inapplicable. It does not matter that the action is not

1980 E. Comm. Ct. J. Rep. 2511, 2536, [1979-1981 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8714, at 8594; *S.A. Cadillon v. Firma Hoss*, 1971 E. Comm. Ct. J. Rep. 351, 356, [1971-1973 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8135, at 7542-43; *Consten & Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 343, [1961-1966 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8046, at 7653; *Société Technique Minière Maschinenbau Ulm GmbH*, 1966 E. Comm. Ct. J. Rep. 235, 240-50, [1961-1966 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8047, at 88-97.

The same principle is shown by the same judgment in *Metro SB-Grossmarkte GmbH v. Comm'n*, 1977 E. Comm. Ct. J. Rep. 1875, [1977-1978 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8435 and by Regulation No. 67/67, art. 3, 10 *J.O. COMM. EUR.* 849 (1967), 1 *COMMON MKT. REP. (CCH)* ¶ 2727.

the subject of any agreement or concerted practice between the parties to the agreement in question, and so would not be, if it had occurred *by itself*, an infringement of article 85(1). Unilateral action by one party to an agreement whose action would not in itself infringe article 85(1) may nevertheless be sufficient to make article 85(3) inapplicable to the agreement, if article 85(1) applies to the agreement for other reasons.²²

Therefore, if there is a selective distribution agreement to which article 85(1) applies for any reason, and the manufacturer refuses to supply goods to a dealer who exports, or imports parallel imports, or reduces prices, the refusal to supply may make article 85(3) inapplicable to the agreement, even if there is no evidence of any agreement or concerted practice by which the dealer's freedom to export was limited. The unilateral refusal to sell is not, in itself, a violation of article 85(1), but it has the same effect as any other measure interfering with parallel imports (or with price competition) would have, viz. it makes article 85(3) inapplicable. This is not to say that there is in itself an obligation to supply under article 85(1). Similarly, continued deliveries to dealers who reduce prices, or who obtain parallel imports, is also likely to be a prerequisite for exemption, assuming an exemption is needed for other reasons.

Of course, if there is no agreement or practice anywhere in the Common Market to which article 85(1) applies, a unilateral refusal by a manufacturer or distributor to supply a dealer cannot by itself make article 85(1) applicable to the dealer agreement. But if there is an agreement to which article 85(1) applies, it may be appropriate that it should be a condition of an exemption that the manufacturer should not refuse to supply dealers elsewhere in the Community with products to be exported to the state in which the agreement in question applies, just as if exports were prevented by the exercise of industrial or commercial property rights. Equally, it may be a condition that the manufacturer should supply the parties to the agreement with products to be exported to other member

22. See *AEG-Telefunken v. Comm'n*, 1983 E. Comm. Ct. J. Rep. 3151, 3195, 3 COMMON MKT. REP. (CCH) ¶ 14,018, at 14,258; *Nungesser v. Comm'n*, 1982 E. Comm. Ct. J. Rep. 2015, 2070, 2073-74, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8805, at 7545-46; see also *Ford Werke*, 26 O.J. Eur. Comm. (No. L 327) 31 (1983), 3 COMMON MKT. REP. (CCH) ¶ 10,539 (final decision, currently under appeal).

states of the Community. The agreement may be in either the importing or the exporting country.

In other words, it may be and usually is a prerequisite of an exemption under article 85(3) for a selective distribution agreement that intrabrand competition, already substantially limited by the selective distribution system itself, must not be substantially limited further by unilateral policies on the part of the manufacturer, whether their effect is to partition the Common Market or to restrict intrabrand price competition.

Specifically, it may be a prerequisite for exemption that dealers should be free to sell to approved dealers and to customers outside their own territories and their own member states, and that customers should not be penalized, for example, by denial of the benefits of manufacturers' guarantees, if they buy outside their member states. Indeed if intrabrand price differences for movable products between member states are so great as to suggest market partitioning and insufficient intrabrand competition, it is logical that an exemption which might otherwise be given should be withdrawn. Companies have no right to make their dealers immune from intrabrand competition.

A specific example of a unilateral policy which would be likely to make exemption inappropriate is two-tier pricing in a selective distribution system i.e., a lower price if the goods are sold for use in the member state in question, and a higher price if the goods are exported.

XIV. *ARTICLE 15(6)*

Article 15(6) of Regulation 17/62 ends the immunity from fines which is provided by notification of an agreement which falls under article 85(1), if the Commission adopts a decision stating that "after a preliminary examination" it considers that the application of article 85(3) is not justified.

It follows from what has been said above that a selective distribution system accompanied by unilateral measures by the manufacturer to terminate supplies to dealers exporting, buying parallel imports, or not complying with the manufacturer's resale price maintenance policy could normally be made the subject of a decision under article 15(6) on that ground.

The practical effect of such a decision would be to compel

a manufacturer to choose between several possible courses of action. First, it could end the interference with exporting, parallel importing, or price cutting. This would end the reason for saying that article 85(3) was inapplicable. New notification of the agreement might be necessary, but in other respects the selective distribution agreements could continue to operate, and a formal exemption under article 85(3) could be obtained, combined probably with a condition terminating the exemption if the manufacturer refused to supply dealers who export, import, or cut prices.

Second, it could put an end to all the features of the distribution agreements which make article 85(1) applicable. If it was willing to do this, it would be free, as far as article 85 was concerned and apart from its obligations under any applicable national law, to refrain from supplying to dealers whose practices it disliked. However, it could not, even by implication, agree with dealers that they should refrain from these practices. The manufacturer would therefore be wise not to tell the dealers that it would terminate supplies if they did specific things, since any such statement could easily be construed as the basis for a concerted practice. Finally, it could challenge the validity of the Commission's decision under article 15(6), if it has any grounds for doing so, and risk being fined for continuing to practice its selective agreement and its policy of refusing to supply dealers who export, import, or cut prices.

XV. *TERMINATING INFRINGEMENTS*

Article 7 of Regulation 17/62 gives the Commission power by decision to require the enterprises involved to bring an infringement of article 85 to an end. A manufacturer who combines a selective distribution system with measures, even unilateral measures, to prevent exports, parallel imports, or price cutting, commits an infringement of the EEC Treaty. When the Commission orders it to end the infringement, it has a choice: it may abandon its selective distribution agreements, so that what it is doing no longer falls under article 85(1), or it may cease interfering with exports, imports, or price cutting, as the case may be. To cease its interference with these legitimate activities of dealers the manufacturer would have to resume supplies to any dealer from whom supplies had been cut

off, unless it could be proved that there was some valid objective and nonrestrictive reason sufficient to justify refusal to renew supplies. In this sense there can be an obligation to supply under article 85(1) combined with article 3 of Regulation 17/62, for the purpose of putting an end to an infringement.²³

It follows that if a manufacturer has a selective distribution agreement to which article 85(1) applies and if the manufacturer terminates supplies to a dealer who is exporting, importing parallel imports, or reducing its resale prices, the manufacturer is almost certainly acting contrary to article 85(3). If therefore, the dealer brings proceedings in a national court for compensation and for an order obliging the manufacturer to resume supplies, it would not normally be necessary for the national judge to adjourn the case to allow the Commission to decide whether or not an exemption should be given under article 85(3). However, no such exemption would be likely to be appropriate. Unless, at the time when the case came before the national judge, the manufacturer had altered its selective distribution agreements in such a way that article 85(1) no longer applied to them, the dealer would normally be entitled to succeed with his claim for compensation. Whether his claim for an injunction ordering the resumption of supplies should be granted would depend on the circumstances of the case. However, if the national law did not make possible an order imposing a positive obligation to supply on a nondiscriminatory basis in any circumstances, the dealer would have to apply to the Commission, and there would be at least a serious question as to whether the absence of any remedy under national law was a breach of the obligations of the member state in question under article 5 to protect the rights of citizens under directly applicable rules of Community Law.

This would be the position where the manufacturer has selective distribution agreements in all member states, or at least in the member state where the dealer carries on his business. A rather different situation arises if the dealer has been supplied directly by the manufacturer, until the latter cut off

23. This is compatible with the general principle referred to in COMMISSION, ELEVENTH REPORT ON COMPETITION POLICY para. 11, at 24 (1982); see also *Demo Studio Schmidt v. Comm'n*, 1983 E. Comm. Ct. J. Rep. 3045, 3064, 3 COMMON MKT. REP. (CCH) ¶ 14,009, at 14,119. *But see Ford Werke v. Comm'n*, 1984 E. Comm. Ct. J. Rep. 1129, 3 COMMON MKT. REP. (CCH) ¶ 14,025.

supplies, but there is no distribution agreement to which article 85(1) applies in the member state in question. In that situation, the dealer cannot lawfully be prevented from buying from other dealers in member states where there are selective distribution agreements, since they can hardly be prevented from selling to any dealer in a state where the manufacturer has no selection system for dealers. If the manufacturer tried to prevent dealers in a selective system from exporting to a dealer, even a dealer which the manufacturer itself did not wish to supply, in a country where there was no selection system, the manufacturer would be likely to make the selective distribution system unlawful. If the manufacturer tried to prevent dealers in a state with no selective distribution system from exporting to nonapproved dealers in a state where the manufacturer had a selective system, it would also risk invalidating the latter system.

XVI. INTERESTS OF THIRD PARTIES

Selective distribution cases frequently involve third parties. They are usually dealers who have been refused admission to the distribution system. They may also be dealers in other countries who are the beneficiaries of restrictions on exports, or of other measures to keep prices up. In this context several recent developments may be of interest.

In *Ford Werke v. Commission*, the Court gave two United Kingdom Ford dealers leave to intervene in support of Ford. The United Kingdom dealers benefitted from Ford's termination of supplies of right-hand drive cars at low German prices to German dealers. The Court's order seems to represent a change in the Court's view on the rights of dealers in one member state to intervene in cases involving a restrictive agreement in another member state.²⁴

The Court also gave the Bureau Européen des Unions de Consommateurs leave to intervene, on broad grounds which

24. The Court's order, dated February 2, 1983, in *Ford Werke v. Comm'n*, 1984 E. Comm. Ct. J. Rep. 357, 3 COMMON MKT. REP. (CCH) ¶ 14,025 (interim measures) seems to imply that its comments in *Consten & Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 346, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7656, no longer represents its attitude.

suggest that it would be entitled to intervene in many cases involving consumer interests or consumer products.

CONCLUSION

The purpose of all these detailed comments on qualitative and quantitative criteria is not to advocate a stricter policy on selective distribution as such. It is merely to show that the range of questions is more complex, and the answers less simple than they might seem, and to show that instead of using a few simple legal rules it is necessary to consider the economic effects of each selective distribution agreement, like those of any other distribution agreement, in the light of all the circumstances. In this respect I agree with Chard,²⁵ though I do not agree with his criticisms of what the Court and the Commission have actually done. More detailed explanations may be needed to show that the Commission's rulings have been consistent. As a result, and without in any way anticipating any legislation which the Commission may propose on selective distribution agreements in any particular sector, it is necessary to make general statements rather than try to formulate formal legal rules applicable to every case.

Even where there are no express territorial restrictions or resale price maintenance clauses, selective distribution systems are likely to have some restrictive effects on competition in practice, and so must be examined critically. Authorized dealers are likely to be fully informed of each other's identities and conscious of each other's policies. Selective distribution systems often have certain features in practice:

1. They are likely to be associated with measures to prevent sales outside the dealers' territories, or at least outside the member state in question, to maintain price levels, and with resale price measures;
2. They facilitate, and are particularly likely to be associated with, concerted practices, pressure from manufacturers, or other practices not expressly mentioned in the distribution agreements, to enforce measures with more restrictive effects on competition than the terms of the agreements themselves;
3. They always reduce intrabrand competition, especially

25. See Chard, *supra* note 7.

intradbrand price competition, to a greater or lesser extent, to maintain high gross profit margins for dealers;

4. They exist often in sectors in which most manufacturers have a selective distribution system and where the market is therefore rather rigid;

5. In *Salonia v. Poidomani*, the Court pointed out another characteristic of selective distribution systems which are organized on a national basis. "Such an agreement which extends throughout the territory of a member state may by its very nature have the effect of reinforcing the partitioning of the market on a national basis, thereby impeding the economic interpenetration which the Treaty is designed to bring about and protecting national production."²⁶

The general policy of the Commission is therefore to prohibit selective distribution arrangements where they are combined with territorial protection, resale price maintenance measures, or horizontal arrangements between distributors, or dealers, or both, to avoid price differences arising. In other cases, if the restriction on competition is sufficient for article 85(1) to apply, serious reasons must be given for any exemption. However, a selective distribution agreement which is not combined with any efforts to maintain prices or to divide the Common Market is in an entirely different situation from one which is combined with efforts or arrangements with that effect. The Court has stressed that agreements can be exempted under article 85(3) only if there are "appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition."²⁷ In the case of such selective distribution agreements, for the reasons outlined above, the advantages in practice often do not compensate for the disadvantages, whatever theoretical defense could be made for the words of the agreements themselves.

As with most types of restrictive agreements, the crucial question is not whether a selective distribution agreement is restrictive, but how restrictive it is in practice. If one leaves

26. *Salonia v. Poidomani*, 1981 E. Comm. Ct. J. Rep. 1563, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8758.

27. *Consten & Grundig v. Comm'n*, 1966 E. Comm. Ct. J. Rep. 299, 348, [1961-1966 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8046, at 7656; see SSI, 25 O.J. EUR. COMM. (No. L 232) 1, 32 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,408, at 10,904.

aside for the moment export bans, resale price maintenance, and similar practices which are not inherent in selective distribution, it seems that the principal issue is the effect on price competition of the limit on the number of outlets. Barriers to entry are less important, unless they affect price competition as they do in supermarkets and hypermarkets.

Concentrating on the effect on price competition has many advantages. First, it looks at the results of the system in practice and not merely at the effect of the clauses in theory, and so takes into account all the practices whether unilateral or concerted, and whether known to the person seeking to make the assessment or not, which may have grown up and which may add to the restrictiveness of a selective distribution system. Second, it makes possible a simple, practical, and economically justifiable approach. If price levels in different member states differ by more than a limited percentage for a significant period, without convincing explanation, the distribution agreements are proving too restrictive and need to be looked at closely and perhaps modified. Finally, it also makes appropriate two practical tests which are called for by the basic need to unify the market: Is every approved dealer free to supply all the products sold by him to buyers from all other member states, and are buyers correspondingly free to buy from all dealers, if necessary through intermediaries, in each case without "discrimination"?²⁸ If the answer to these questions is yes, there should be a reasonable degree of interstate trade and intrabrand price competition. If there is not, an explanation may be needed. For this purpose "discrimination" may include delays in delivery of goods to be sold to nonresident buyers or suitable for export, or refusal to honor a guarantee or warranty if the goods were purchased in another member state, or differential pricing.

Accordingly, it seems to me personally that in order to limit the amount of time to be spent by the Commission on selective distribution cases one could envisage group exemptions which would apply if there was a satisfactory degree of

28. Ford Werke, 25 O.J. EUR. COMM. (No. L 256) 20, 26 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,419, at 10,931 (interim measures); BMW, 18 O.J. EUR. COMM. (No. L 29) 1, 7, 8 (1975), [1973-1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 9701, at 9539-10 to 9539-11; COMMISSION, ELEVENTH REPORT ON COMPETITION POLICY para. 11, at 24 (1982).

interbrand competition and if, but only if, the following other conditions were all fulfilled:

1. No horizontal collusion between either manufacturers or dealers; no vertical collusion on prices or market partitioning; and no serious likelihood of any such collusion;
2. No interference with or discrimination against parallel imports by dealers in either member state or by the manufacturer;
3. No resale price maintenance;
4. Criteria must be uniform and applied in a nondiscriminatory fashion, and any differences between member states must be explained fully and justified;
5. Differences between price levels in different member states to be less than a specified percentage;
6. No selective distribution if the manufacturer is dominant (because interbrand competition will not be strong enough).

Perhaps if it was clear that selective distribution agreements had to comply with these principles, they would be less fashionable than they are at present. If that is so, very strong and clear arguments would be needed to justify exempting a selective distribution system that did not fulfill these requirements.