

**COMMISSION DECISION**

of **16.07.2003**

**relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement**

**(Case COMP/37.975 PO/Yamaha)**

**Only the English text is authentic**

**(Text with EEA relevance)**

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**THE COMMISSION OF THE EUROPEAN COMMUNITIES,**

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty<sup>1</sup>, as last amended by Regulation (EC) No 1216/99<sup>2</sup>, and in particular Article 3 and Article 15(2) thereof,

Having regard to the Commission Decision of 3 May 2002 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty<sup>3</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case,

Whereas:

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<sup>1</sup> OJ L3, 21.2.1962, p. 204/62

<sup>2</sup> OJ L 148, 15.6.1999, p. 5.

<sup>3</sup> OJ L 354, 30.12.1998, p. 18.

## 1. FACTS

### 1.1.Introduction

1. This case concerns the agreements and practices governing the distribution of musical instruments manufactured and sold by the Yamaha group (hereinafter “Yamaha”, unless a more specific name for a subsidiary is used) run by Yamaha Corporation Japan. Most of the Yamaha products described hereinafter are distributed by authorised dealers under a selective distribution system<sup>4</sup> throughout Europe. However, in Finland, Greece, Iceland and Ireland, Yamaha has appointed country-specific exclusive importer-distributors.
2. According to Yamaha, the nature of the relevant products does require a selective distribution system in order to preserve their quality and ensure their proper use. Yamaha has developed a strategy based on personalized customer advice by selected dealers which takes into account the need to demonstrate Yamaha products in accordance with Yamaha’s reputation for quality and its recognized brand image and also reflects the complexity of the products and the need to demonstrate their audio quality.
3. The case was initiated by the Commission and is based on information gathered via requests for information. In October 2000 the Commission sent out simultaneous requests for information to all European based subsidiaries of Yamaha, and to several dealers as well. In December 2000, Yamaha Europa GmbH, Germany, submitted its answers, which consist in documents covering each EEA Contracting Party. From copies of the contracts submitted by Yamaha Europa GmbH, Germany, or by dealers, it became evident that a number of infringements of competition law had been committed.
4. In January 2001, Yamaha Europa GmbH, Germany, wrote to the Commission to explain that prior to this inquiry, it had begun an internal review of its European distribution agreements with a view to adopting a standardised European distribution agreement. In connection with this review, Yamaha Europa GmbH, Germany, had identified provisions in its distribution agreements which it had decided should be modified even before the adoption of the standardised European distribution agreement. Yamaha Europa GmbH, Germany, had therefore written to its dealers and/or importers to clarify and/or amend the relevant provisions. Yamaha Europa GmbH, Germany, submitted copies of these letters. However, not all the restrictions of competition had been amended or identified.
5. In May 2001, Yamaha Europa GmbH, Germany, submitted its new draft Agreement to the Commission. It intended to build a European wide distribution system which would be selective for certain products on the basis of objective criteria, with a Europe-wide guarantee and similar prices. On 5 March 2002, Yamaha Europa GmbH, Germany, notified its new distribution Agreements in accordance with

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<sup>4</sup> However, some products in the range of electronic musical instruments and music-related products such as accessories may be sold outside the selective distribution system.

Regulation No 175. These new distribution Agreements do not contain restrictions of competition anymore.

6. On 3 May 2002, the Commission addressed a Statement of Objections to Yamaha Corporation Japan, Yamaha Europa GmbH, Yamaha Musica Italia s.p.a., Yamaha Musique France S.A. and Yamaha Scandinavia AB. Yamaha sent its reply on 5 August 2002. An oral hearing took place on 24 October 2002.

## **1.2.The parties**

7. The present Decision is addressed to:
- (a) YAMAHA Corporation Japan
  - (b) YAMAHA Europa GmbH, Germany
  - (c) YAMAHA Musica Italia S.p.A.
  - (d) YAMAHA Musique France S.A.
  - (e) YAMAHA Scandinavia AB
8. Yamaha is mainly active in the production and trade of musical instruments and audio products, lifestyle related products, electronic equipment and metal products and recreation. The net sales of the Yamaha Group in Europe were [...]Yen (EUR [...]) in 2001. Yamaha sales in the fiscal year 2001 totalled more than 519.1 billion Yen worldwide (EUR 4.74 billion<sup>6</sup>). For musical instruments only, the net sales totalled EUR 2.6 billion world-wide.
9. Yamaha Corporation Japan has several subsidiaries in Europe. The main one is Yamaha Europa GmbH, Germany. Yamaha Europa GmbH, Germany, is a 100% subsidiary of Yamaha Corporation Japan. Yamaha Europa GmbH, Germany, has four European branches: Yamaha Europa GmbH, Zweigniederlassung Wien; Yamaha Music Belgium; Yamaha Music Nederland; and Yamaha Europa GmbH, Zweigniederlassung Zürich. Yamaha Europa GmbH, Germany, also has two subsidiaries in Europe: Yamaha Scandinavia AB, Sweden<sup>7</sup>, (with its branches Yamaha Scandinavia AB Denmark, and Yamaha Scandinavia AB, Norway), and Yamaha Musique France S.A.<sup>8</sup>.

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<sup>5</sup> Application for Negative clearance and, in the alternative, exemption, registered under the number F-1/38.382.

<sup>6</sup> The exchange rate of Euro was, at the time of the presentation of the financial results (May 2001), 109.577 Yen.

<sup>7</sup> Yamaha Scandinavia AB is a private Company registered in Sweden. It is a 100 % subsidiary of Yamaha Europa GmbH, Germany.

<sup>8</sup> Yamaha Musique France SA is a private company registered in France. It is a subsidiary of Yamaha Europa GmbH, Germany (which holds 72.7 %) and a minority shareholding by Yamaha Corporation Japan (which holds 27.3 %).

10. The other European subsidiaries of Yamaha Corporation Japan are: Yamaha-Kemble Music (U.K.) Ltd<sup>9</sup>, Yamaha Musica Italia s.p.a.<sup>10</sup>, and Yamaha-Hazen Electronica Musical, S.A<sup>11</sup> (Spain).
11. Yamaha has appointed country-specific exclusive importer-distributors in four European countries, notably in Greece [ ... ] and Iceland [ ... ].

### **1.3.The relevant products and geographical markets**

#### *1.3.1. Introduction*

12. Yamaha distributes a whole range of traditional as well as electronic musical instruments and electronic equipment to generate, amplify and modify sounds. The parties have provided the following relevant product market definitions. They have suggested separate markets for acoustic pianos, home digital pianos, electronic organs, portable keyboards, high tech electronic musical products, pro audio products, drums, guitars and wind instruments. With regard to the geographic market definition, the parties assumed national markets.
13. It is important to note that in any possible market definition, the likely effects of the agreements and practices on competition and trade between Member States would be appreciable. Indeed, the restrictions of competition identified hereafter are considered as hardcore restrictions.

#### *1.3.2. Product markets*

##### *1.3.2.1. Acoustic pianos*

14. The acoustic piano sector includes, according to Yamaha, upright, grand and “hybrid” products. Acoustic pianos are large, furniture encased keyboard instruments using the traditional hammer and string technology. Acoustic pianos include both the upright pianos with vertical frame and strings and the more expensive grand styles with horizontal frames and strings, varying in size from 1,5 meters to approximately 3 meters in length. Yamaha argues that there is nonetheless a degree of overlap on the demand side between grands and uprights. Moreover all of the principal acoustic piano suppliers including Yamaha offer “full line” portfolios of both upright and grand models, and wholesale and retail distributors carry the same “full line” portfolios.
15. Acoustic pianos (even used ones) can be fitted with electronic auxiliary equipment to be played silently with headphones. If enabled, a mute rail prevents – if enabled - the piano's hammers from striking the strings, thus preventing any sounds from emerging. A piano synthesiser picks up the keys being played, and outputs the piano sound to the headphones. This allows the pianist to practice in silence (Yamaha Silent Series). The Yamaha series uses a technique whereby optical sensors capture the instant and speed of the hammer and a microprocessor transforms this

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<sup>9</sup> Yamaha-Kemble Music (UK) Ltd is a private company registered in England. It is a subsidiary of Yamaha Corporation Japan (which holds 87.5%) and a minority shareholding by the Kemble Family.

<sup>10</sup> Yamaha Musica Italia S.p.A.. is a private company registered in Italy and a 100 % subsidiary of Yamaha Corporation Japan.

<sup>11</sup> Yamaha-Hazen Electronica Musical SA is a private company registered in Spain. It is a 75 % subsidiary of Yamaha Corporation Japan and a minority shareholding by Hazen family.



information into the equivalent sound. In addition the keyboard can be fitted with a solenoid system, whereby the piano “plays on its own” controlled by a microprocessor. Yamaha states that equipped “hybrid pianos” are in the same market as acoustic pianos. From the viewpoint of supply side hybrid pianos are basically acoustic pianos with added features, and from the demand side in competition with acoustic pianos.

16. Yamaha considers that new pianos are in competition with used pianos. Pianos can be used for several decades. There have been no major innovations during the past 100 years, and there is an active sector selling and refurbishing used pianos. Moreover the price difference between new and used pianos is very limited in scale; 10 year old used pianos are about 10% less expensive than new ones.

#### 1.3.2.2. Home digital pianos

17. A "digital" piano is an instrument, which uses digitally sampled sounds, amplifiers and speakers instead of strings and hammers to produce the piano-like sound. They have sophisticated weighted key action to imitate the action of an acoustic piano. Whereas acoustic pianos are elegant pieces of wooden furniture often bought as much for their decorative appeal as for their music generating function, digital pianos are often made out of laminated fibre sheet or plastic, are more compact in size and cost considerably less. Digital pianos often have functions not available on acoustic pianos, like automatic accords, rhythm functions and alternative musical instrument sounds. However they are usually marketed by piano retailers and address similar customer groups.
18. Although there is a small but active distribution of second hand digital pianos, Yamaha has excluded this information from their market share estimates.

#### 1.3.2.3. Electronic organs

19. Electronic organs produce sound in an analogue electronic form. Yamaha states that this market is rapidly declining and Yamaha intends to withdraw from the market in Europe.

#### 1.3.2.4. Portable keyboards

20. Portable keyboards are digital computers that contain electronic recordings of sounds and reproduce them according to the speed and intensity of the hit on the keyboard. Usually portable keyboards have a wide range of pre-set sounds and upmarket models can upload additional instrument sounds as well as transfer their output to a personal computer via “midi” link where it can be registered and modified. This market segment is worth more than a quarter of Yamaha Europe’s turnover in musical instruments.

#### 1.3.2.5. High tech electronic musical instruments

21. High tech electronic musical instruments include stage pianos, synthesizers and ancillary specialised components used for composing and/or professional performance. Stage pianos are usually input devices with a sophisticated keyboard (some even use the hammer technique of acoustic pianos), and usually with no, or a rather limited choice, of voices. The input is then sent to a synthesiser, (sometimes a

sound card of a computer) whereby several voices can be added and effects can be played.

#### 1.3.2.6. Pro audio products

22. The pro audio market covers various types of products such as speakers, microphones, sound mixing equipment, multi-track recorders and power amplifiers. This segment is worth about [...] % of Yamaha Europa's turnover in musical instrument.

#### 1.3.2.7. Drums

23. Acoustic drums and drum sets are an individual sort of instrument. They are characterised by a substantial degree of production substitutability and "full line" portfolio at both the manufacturing and the distribution level.
24. Yamaha also manufactures electronic drums, which comprise an electronic microprocessor equipment (drum machine, sequencer) to produce a digital sound most similar to portable keyboards or high-tech instruments. Some can also be used to play accompanying rhythms to other instruments. Electronic pads convert the speed and place where the drummer hits the pad, so that the same sounds are reproduced as if they were generated by striking acoustic drum kits. Electronic drums also offer the opportunity to play with headphones or at a very low volume.

#### 1.3.2.8. Guitars

25. Yamaha supplies a "full line" portfolio of acoustic and electric guitars. Yamaha argues that a single market for acoustic and electric guitars exists, as there is supply side substitutability. Most suppliers like Kaman, Cort, Arai, Fener, Gibson and KHS offer a full line of both electric and acoustic guitars, and most European wholesalers/distributors purchase and resell full lines of guitars. It seems however more relevant to distinguish two different markets, one for acoustic guitars, and one for electric guitars.

#### 1.3.2.9. Wind instruments

26. Wind instruments are musical instruments in which air itself is the primary vibrating medium for the production of sound. They are traditionally grouped into woodwind<sup>12</sup> instruments composed of the flutes and reed pipes (namely, clarinet, oboe, bassoon, and saxophone) and brass instruments (for example, trumpet, trombone, tuba horn).

#### 1.3.2.10. Electronic string instruments (Yamaha SV Series)

27. Yamaha has a rather restricted selection of "silent" string instruments (for example, violins, cellos, bass) whereby the output is in an electronic form in order to allow

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<sup>12</sup> Flutes and reed pipes were traditionally made of wood, but now they may also be constructed of metal. Unlike brass instruments in which the airstream passes through the player's vibrating lips directly into the air column, flutes are sounded by directing a narrow stream of air against the edge of a hole in a cylindrical tube. In reed pipes a thin strip of flexible material, such as cane or metal, is placed against the opening of the mouthpiece, forcing the airstream to pass through the reed before it reaches the column of air that is to vibrate.

playing using headphones or an amplifier. Yamaha did not specify these products as a separate market and did not provide any additional information.

### *1.3.3. Geographic market*

28. In its decision on interim measures IV/32.279 - BBI/Boosey & Hawkes<sup>13</sup> the Commission defined a market for the particular needs of British-style brass bands which was national in scope.
29. The distribution networks are organised on a country by country basis or groups of countries. For some products, price differences amount to up to 50% and differences in taste and traditions are considerable. Therefore the geographic market is considered to be **national**. The parties assumed national markets as well.

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<sup>13</sup> Commission Decision 87/500/EEC of 29 July 1987, OJ L 286 , 9.10.1987 p. 36.

## 1.4.Yamaha's position in Europe

30. Yamaha's market shares are vary widely between countries. In 1999, Yamaha was the market leader in most of the relevant markets for musical instruments, as can be seen from table 1. No other company was similarly represented in all the markets for musical instruments.

**Table 1**  
**Overview of Yamaha's market shares in 1999 (in %)**

Data provided by Yamaha

	UK	I	E	P	DK	NO	S	FIN	Fr	EL	D	B	NL	A	IRL	IS	Avg
New ac. Pianos	30-40	20-30	20-30	30-40	20-30	20-30	40-50	30-40	20-30	20-30	10-20	50-60	20-30	10-20	20-30	30-40	20-30
New&used pianos	10-20	20-30	10-20	20-30	10-20	10-20	20-30	10-20	10-20	20-30	10-20	30-40	10-20	10-20	10-20		10-20
New digital pianos	30-40	30-40	30-40	10-20	30-40	30-40	30-40	20-30	50-60	50-60	30-40	20-30	20-30	20-30	40-50	10-20	30-40
New electronic organs	50-60	30-40	50-60	<10	<10	<10	<10	<10	70-80	80-90	10-20	<10	<10	10-20	40-50	*	20-30
New portable keyboards	40-50	20-30	20-30	10-20	30-40	30-40	30-40	30-40	30-40	40-50	30-40	40-50	40-50	40-50	80-90	30-40	30-40
High tech	10-20	10-20	10-20	<10	<10	10-20	10-20	10-20	20-30	10-20	<10	10-20	10-20	<10	10-20	20-30	10-20
Woodwind	20-30	20-30	10-20	10-20	20-30	20-30	20-30	30-40	30-40	10-20	30-40	50-60	20-30	30-40	10-20	*	20-30
Brass	10-20	10-20	10-20	30-40	10-20	20-30	10-20	10-20	30-40	10-20	10-20	20-30	20-30	20-30	10-20	*	20-30
Acoustic guitars	10-20	20-30	<10	<10	10-20	<10	10-20	10-20	10-20	10-20	10-20	<10	10-20	10-20	10-20	*	10-20
Electric guitars	<10	<10	<10	<10	<10	<10	<10	<10	<10	10-20	10-20	<10	10-20	10-20	10-20	*	<10
Total guitars	10-20	10-20	<10	<10	<10	<10	10-20	10-20	10-20	10-20	10-20	<10	10-20	10-20	10-20	30-40	10-20
Acoustic drums	10-20	10-20	10-20	<10	10-20	20-30	10-20	10-20	10-20	10-20	20-30	<10	10-20	10-20	30-40	*	10-20
Electric drums	40-50	40-50	50-60	20-30	10-20	<10	40-50	10-20	60-70	20-30	20-30	<10	20-30	10-20	40-50	*	30-40

total drums	20-30	20-30	10-20	<10	10-20	20-30	10-20	10-20	20-30	20-30	20-30	<10	10-20	10-20	30-40	10-20	10-20
Pro audio	<10	<10	<10	<10	<10	<10	<10	<10	10-20	<10	<10	<10	10-20	<10	20-30	10-20	<10
AVERAGE	20-30	20-30	10-20	10-20	10-20	10-20	10-20	10-20	20-30	20-30	10-20	10-20	10-20	10-20	20-30	20-30	10-20

(\*Data not available)

**Table 2**  
**Yamaha sales – sales values at wholesale prices in 1999**  
(Data provided by Yamaha)

000 €	UK	I	E	P	DK	NO	S	FIN	F	EL	D	B	NL	A	IRL	IS
New ac. & hybrid Pianos	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
New digital pianos	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
New portable keyboards	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Hi tech	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Electronic organs, portable keyboards and hi-tech	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Wind instruments	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Woodwind	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Brass	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total guitars	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Total drums	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Pro audio	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

## 1.5. Agreements and practices in the operation of Yamaha's distribution network

### 1.5.1. Restrictions on direct or indirect export sales into other Member States

#### 1.5.1.1. Obligations on official distributors to sell solely to final customers and/or to buy solely from Yamaha's national subsidiary

31. In Germany, Italy and France, Yamaha's authorised dealers were obliged to buy solely from Yamaha's national subsidiary and/or to sell solely to final consumers. Yamaha does not dispute the existence of these provisions.

#### (a) Germany

32. Yamaha's distribution contracts obliged the authorised German dealers to sell only to final customers and therefore not to any other dealers. These contracts concerned pianos, grand pianos, Gran Touch pianos<sup>14</sup>; Clavinovas (digital pianos), Electone electronic organs, and the Portatone product range (keyboards)<sup>15</sup>; but also PAC16 (ProAudio, guitars and drums) and orchestra instruments<sup>17</sup>.

33. For example, Article 1 of the distribution contract for grand pianos stated that:

*"The specialist dealer undertakes to sell Yamaha grand pianos solely to final customers."*<sup>18</sup>

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<sup>14</sup> Distribution agreements between January 1996 and March 2000 provided by Yamaha with for pianos (8 May 1998), grand pianos (8 May 1998); Distribution agreements signed with [ ... ] for pianos (1 April 1986), grand pianos (4 December 1995), gran touch pianos (16 July 1996); Distribution agreements signed with [ ... ] for pianos and grand pianos (11 June 1987, new contracts signed on 20 July 1999); Distribution agreement signed with [ ... ] for Gran Touch pianos (3 April 1997); Distribution agreements signed with [ ... ] for pianos, grand pianos, gran touch pianos (4 August 1998).

<sup>15</sup> Distribution agreements between January 1996 and March 2000 provided by Yamaha for Electone, Portatone, Portasound and Clavinova signed with [ ... ] (2 January 1997); Distribution agreements signed with [ ... ] for Electone (1 April 1986), Clavinova (30 June 1987), Portasound (30 November 1987) and Portatone (30 November 1987); Distribution agreements signed with [ ... ] for Electone (1 April 1986), Portatone and Portasound (18 December 1987), Clavinova (June 1987); Distribution agreements signed with [ ... ] for Electone (13 January 1994), Portasound (3 April 1987); Distribution agreements signed with [ ... ] for Portatone and Portasound (June 1987), Electone (1 April 1986), Clavinova (15 January 1988); Distribution agreements signed with [ ... ] Portasound and Portatone (20 August 1990, new contract signed on 23 December 1999), Clavinova ( 26 March 1992, new contract signed on 23 December 1999).

<sup>16</sup> Distribution agreements signed with [ ... ] for professional equipment (10 May 1986); distribution agreements signed with [ ... ] for professional equipment (16 October 1987, new contract signed on 5 March 1996), for acoustical guitars (15 August 1994, 31 October 1995); distribution agreements signed with [ ... ] for PA, drums, guitars, amps (19 October 1989, 9 October 1996, 19 August 1997, 5 December 1997).

<sup>17</sup> Sample distribution Agreement with [ ... ] of 19 March 1996 (Holzblasinstrumente, Blechblasinstrumente, Blockflöten); Distribution Agreement with of 16 June 1977 (Holzblasinstrumente, Blechblasinstrumente, Gitarren, Verstärker, Combo-Orgeln, Synthetiser, Schlagzeuge, Combo-pianos), of 26 March 1993 (concert percussion), of 15 November 1995 (Blockflöten); Distribution agreement with [ ... ] of 3 October 1979 (Kleinmusikinstrumente, Professional equipment), of 4 May 1977 (Blasinstrumente, Gitarren, Verstärker, Combo-Orgeln, Drums); Distribution agreement with [ ... ] of 12 September 1986.

<sup>18</sup> Standard agreement for Eterna Pianos, File p. 8358; for Pianos p. 8362; for grand pianos p. 8372; for electronic Grand Touch Pianos p. 8375. *The translation was provided by the Commission's services as all following translations.* Original version: *Artikel 1: "Der Fachhändler verpflichtet sich, Yamaha Flügel nur an Endabnehmer weiter zu veräußern."*

34. The contracts, the oldest of which in the Commission's possession is dated June 1977, ended in March 2000, the date of entry into force of the Euro-distribution contract.

(b) *Italy*

35. In Italy, Yamaha's distribution contract obliged the dealer to buy pianos exclusively from Yamaha Musica Italia s.p.a. and to sell products solely to final customers.

36. Article 4 of the distribution contract for pianos stated as follows:

*"Besides the obligations foreseen in article 2, the authorised retailer undertakes:*

- to buy Yamaha pianos or other products distributed by YAMAHA MUSICA ITALIA only from the latter company*
- only to sell the products to the final customers".<sup>19</sup>*

37. The oldest relevant contract in the Commission's possession is dated March 1992. Yamaha Musica Italia s.p.a. terminated these distribution contracts for pianos in October 1996. Since October 1996, pianos have been distributed through another type of contract without the clause referred to in the previous recital<sup>20</sup>.

(c) *France*

38. Yamaha's distribution contracts obliged the dealers to buy pianos exclusively from Yamaha Musique France S.A. and to sell only to the final customers. Article 4 of the distribution contract for pianos states:

*"The authorised dealer undertakes:*

- to buy Yamaha pianos or other brands distributed by YAMAHA FRANCE exclusively from YAMAHA FRANCE*
- to sell the products only to the consumers".<sup>21</sup>*

39. The same clause appeared in Article 4 of the distribution contract for Disklaviers (digital pianos):

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<sup>19</sup> File, p. 3012. Contratto di Distribuzione selettiva per i pianoforti verticali – Distribuiti dalla Yamaha Musica Italia s.p.a. & [ ... ], 31.03.92, ended in October 1996. *Articolo 4: "Oltre agli obblighi previsti nell'articolo 2, il Rivenditore Autorizzato s'impegna a:*

*- approvvigionarsi dei pianoforti Yamaha o altri marchi distribuiti dalla YAMAHA MUSICA ITALIA, esclusivamente da quest'ultima;*  
*- non vendere i prodotti che agli utenti finali".*

<sup>20</sup> Yamaha's reply to the Statement of Objections, paragraph 173.

<sup>21</sup> File, p. 7944. Distribution contract for pianos signed between Yamaha Musique France S.A. [ ... ] and 3 March 1989. (This clause no longer appears in the new distribution contract signed in February 1997). Distribution contract for pianos between Yamaha Musique France S.A. and [ ... ] 10 February 1989. (This clause no longer appears in the new distribution contract signed on April 2, 1997). *Article 4:*

*"Le distributeur agréé s'oblige à:*

*-se fournir en Pianos YAMAHA ou autres marques distribuées par YAMAHA FRANCE, exclusivement auprès de YAMAHA FRANCE*  
*-ne vendre les produits qu'aux consommateurs".*

*“The authorised dealer undertakes:*

- *to buy Disklaviers exclusively from YAMAHA France*
- *to sell the products only to the consumers”*.<sup>22</sup>

40. Yamaha introduced this selective distribution agreement in France covering disklaviers and pianos for the first time in February 1989. 30 out of the 90 piano and disklavier dealers of Yamaha Musique France signed the February 1989 agreement. In September 1989, Yamaha Musique France modified the selective distribution agreement for pianos and disklaviers. The September 1989 agreement, which did not contain the clause in question, was signed by the remaining two-thirds of Yamaha Musique France’s pianos and disklavier dealers. Both the February and September version of the 1989 agreement were terminated in December 1996 and replaced by a single agreement covering both pianos and disklaviers (the “1997 Agreement”)<sup>23</sup>.

1.5.1.2. Obligations on official Yamaha distributors to supply solely distributors authorised by the national subsidiary of Yamaha

41. In some European distribution contracts, dealers were allowed to supply only dealers authorised by Yamaha in their country.

(a) *France*

42. From 1997 to March 2002, Article 4 of the distribution contracts for pianos stated:

*“The authorised dealer undertakes to buy pianos exclusively from YAMAHA France or another dealer authorised by YAMAHA France”*.<sup>24</sup>

43. The relevant contracts were in force from February 1997 to March 2002, when the “1997 Agreement” expired.

(b) *Austria*

44. The relevant provisions read:

*“Yamaha Europa GmbH, Branch Wien –hereinafter Yamaha”*.

45. Paragraph 1 of the Austrian distribution contract stated:<sup>25</sup>

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<sup>22</sup> File, p. 7950. Contrat de distribution sélective pour les Disklaviers distribués par Yamaha, signed between Yamaha Musique France S.A. and [ ... ], 17 May 1989; or same contract signed between Yamaha Musique France S.A. and [ ... ], 11 July 1989: *Article 4: “Le distributeur agréé s’oblige à: - se fournir en Disklaviers exclusivement auprès de YAMAHA FRANCE; - ne vendre les produits qu’aux utilisateurs”*.

<sup>23</sup> Yamaha’s reply to the Statement of Objections, paragraph 176-180

<sup>24</sup> File, p. 7939. Contrat de distribution sélective pour les pianos distribués par Yamaha, signed between Yamaha Musique France S.A. and [ ... ], 24 February 1997; or same contract between Yamaha Musique France S.A. and [ ... ], 11 February 97:

*“Le distributeur agréé s’oblige à se fournir dans la gamme des Pianos exclusivement auprès de Yamaha France ou d’ un autre distributeur agréé par Yamaha France”*.

<sup>25</sup> File, p. 10983. Standard distribution contract with [ ... ], 28 March 2000: §1.3 *“Der Fachhändler wird keine von Yamaha nicht autorisierten Händler beliefern. Verstöße gegen diese Bestimmungen werden wie folgt geahndet: Bei Bekanntwerden einer Querlieferung an einen nicht von Yamaha autorisierten*



*“The specialised dealer will not supply dealers not authorised by Yamaha<sup>26</sup> (defined on the first page of the contract as Yamaha Wien). Infringements of this provision will be sanctioned as follows: upon becoming aware of a cross delivery to an unauthorised dealer of Yamaha a warning will be given by the lawyers of Yamaha. In this warning the dealer will be required not to sell to unauthorised dealers, in order to avoid a penalty for breach of contract of at least 3000 Euro”.*

46. The Austrian contracts were in force from March 2000 to March 2002, date of expiry of the Euro distribution agreement.

(c) *Belgium*

47. In the French and Flemish version of the Eurocontracts the dealer undertook not to sell to dealers other than those authorised by Yamaha, Yamaha being defined as the Belgium branch of Yamaha. The relevant provisions read:

*“Yamaha Europa GmbH, Branch: Yamaha Music Belgium, hereinafter Yamaha”<sup>27</sup>*

*Article 1: “The party to the contract must not make deliveries or sales to retailers that have not been authorised by Yamaha.”<sup>28</sup>*

48. The Belgian contracts were in force from March 2000 to March 2002, date of expiry of the Euro distribution agreement.

(d) *The Netherlands*

49. The relevant provisions read:

*“Yamaha Europa GmbH, acting under the name of Yamaha Music Nederland, hereinafter Yamaha”*

*Article 1: “The party to the contract is not allowed to sell Yamaha<sup>29</sup> products for resale to retailers, that have not been authorised as official Yamaha retailers”.<sup>30</sup>*

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*Händler erfolgt eine Abmahnung durch die Anwälte von Yamaha. In der Abmahnung wird verlangt, daß der vertragsbrüchige Händler sich verpflichtet, es- bei Meidung einer Vertragsstrafe von mindestens 3.000 Euro, für den Fall einer Zuwiderhandlung zu unterlassen, an nicht autorisierte Händler zu verkaufen”.*

<sup>26</sup> Read: Yamaha Europa GmbH, Wien.

<sup>27</sup> File, p. 962 [ ... ], Convention de commercialisation, dated 14 March 2000. Yamaha, défini comme Yamaha Europa GmbH, Germany, Succursale Yamaha Music Belgium: Article 1.3: “Le contractant ne peut procéder à des livraisons ou ventes à d’autres détaillants qui n’auraient pas été agréés par YAMAHA”.

<sup>28</sup> File, p. 1087 [ ... ] Artikel 1.3: “De contractant verbindt zich ertoe niet te leveren aan handelaars die niet door YAMAHA erkend zijn.”

identical:

[ ... ]

[ ... ]

[ ... ]

[ ... ]

[ ... ]

[ ... ]

<sup>29</sup> Defined as YAMAHA EUROPA GmbH, Germany, acting under the name of “Yamaha Music Nederland”, Utrecht.

50. The Dutch contracts were in force from October 2000 to March 2002, date of expiry of the Euro distribution agreement.

1.5.1.3. Obligation to contact Yamaha Europa GmbH, Germany, before exportation via the Internet

51. In the so-called Euro distribution agreements -a standardized contract covering each product- of Austria, Belgium and Germany, signed in 2000, official Yamaha distributors were obliged to contact Yamaha Europa GmbH, Germany, or its corresponding national branch before exportation. A circular letter<sup>31</sup> dated January 2001 from Yamaha Europa GmbH, Germany, explained that the dealer had to contact Yamaha only in case of exports outside the EEA.

(a) *Austria*

52. The Austrian distribution contract obliged the dealer to contact Yamaha Europa GmbH, Wien, before it delivered goods to a customer outside its Member State.

Article 11 of the contract, called “Internet clause”, read:

*“Because of diverging security standards like for instance the CE standard, standards for the protection of intermittent radio frequencies, the dangerous material regulation and technical standards etc... cross border deliveries have to be arranged beforehand with Yamaha.”<sup>32</sup>*

*“...As long as the authorised dealer advertises according to the contents of Article 11(Internet) the use of Yamaha’s rights is permitted...”<sup>33</sup>*

(b) *Belgium*

53. Article 11 of the distribution contract read:

*“The party to the contract will have to agree with Yamaha the conditions concerning supplies abroad because of diverging security standards including for example the*

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<sup>30</sup> File, p. 2030. Euro-distribution Agreement between Yamaha Europa GmbH, acting under the name of Yamaha Music Nederland, and [ ... ], dated October 20, 2000, Hout- en Koperblaasinstrumenten; Euro-distribution Agreement between Yamaha Europa GmbH, acting under the name of Yamaha Music Nederland, and [ ... ], Upright Pianos, inkl Silent, Disklavier, GranTouch Clavinovas, Portable Keyboards, Gitaren/Amplifiers; Acoustic and electronic drums, Synthesizer and PA Equipment; Euro-distribution Agreement between Yamaha Europa GmbH, acting under the name of Yamaha Music Nederland, and [ ... ] dated October 5, 2000, upright pianos, vleugels, silent, disklavier grantouch, clavinova digital pianos, p. 2160. Artikel 1: “Het is de contractant niet toegestaan YAMAHA producten ten behoeve van wederverkoop aan detailhandelaren door te leveren, welke niet door YAMAHA als officiële YAMAHA-dealer worden erkend.”

<sup>31</sup> File, p. 13565, Letter from Yamaha Europa GmbH, Germany, January 2001.

<sup>32</sup> File, p. 10982. Article 11, Euro-Vereinbarung zwischen Yamaha Europa GmbH, Zweigniederlassung Wien und der Firma [ ... ] betreffend Piano & Flügel, Orchester-Instrumente, Tasteninstrumente & Keyboardsysteme, Gitarren & Drums und Pro Audio, 28.03.2000: “Aufgrund nach wie vor unterschiedlichen Sicherheitsstandards, wie zB CE-Norm, Funkschutzzeichen, Gefahrstoffverordnung etc. und technischer Standards sind grenzüberschreitende Lieferungen im Vorwege mit Yamaha abzusprechen”.

<sup>33</sup> Article 10 of the distribution agreement with [ ... ]  
*“...Sofern der Vertragshändler entsprechend dem Inhalt des §11 (Internet) wirbt, ist eine Nutzung der Rechte der YAMAHA zulässig, sofern diese sich im Rahmen des Inhaltes des § 11 bewegt.”*

*CE standard, standards for the protection of intermittent radio frequencies, dangerous materials, etc, as well as technical standards*”<sup>34</sup>

54. Article 10 of the same agreement stated that non-compliance with article 11 would be sanctioned by the prohibition to use the Yamaha brand name, which would actually result in the dealer being unable to trade the Yamaha instruments:

*« The indefinite right of the party to the contract to use trade mark, commercial names and other Yamaha symbols will stop automatically in case of non compliance with the clauses contained in Article 11 or in case of termination of the present contract »*<sup>35</sup>

55. The Flemish text contained the same provisions:

*“On the basis of the existing diverging security norms, such as, e.g. the CE-norm, non- interference marks, regulations concerning hazardous substances etc. and technical norms, cross border supplies need to be agreed with Yamaha in advance”*.<sup>36</sup>

*“The right of the contracting party to use the trade marks, trade names or other signs of Yamaha during the term of the agreement will expire, if the contracting party acts in a way contrary with the content of §11 (internet), or in case the agreement has been terminated in its entirety”*.<sup>37</sup>

- (c) Germany

56. The German contracts also contained similar provisions<sup>38</sup>:

*“Because of diverging security standards like for instance the CE standard, standards for the protection of intermittent radio frequencies, the dangerous material regulation and technical standards etc... cross border deliveries have to be arranged beforehand with Yamaha”*.

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<sup>34</sup> File, p. 962. Convention de commercialisation européenne entre Yamaha Europa GmbH, succursale Yamaha Music Belgium et [ ... ], Article 11. (same text: Pianos Droits et Pianos à Queues; contract [ ... ] 00018- Y 00027) dated 14 March 2000:

*« En outre, le contractant ... devra convenir au préalable avec Yamaha des modalités concernant les livraisons à l'étranger en raison des différences existant toujours en matière de normes de sécurité, comme par exemple la norme CE, la protection radio, la clause sur les produits dangereux, etc, ainsi que les différentes normes techniques »*.

<sup>35</sup> File, p. 966. Article 10 of the same distribution contract, *“Le droit, essentiellement précaire, du contractant d'utiliser la marque de fabrication, les noms commerciaux et autres sigles YAMAHA prend fin automatiquement en cas de non respect des clauses prévues à l'article 11 ci-après ou en cas de résiliation, pour quelque cause que ce soit, de la présente convention »*.

<sup>36</sup> File, p. 1023 [ ... ] rechte Pianos en Vleugelpianos dated 1 April 2000.” *Op basis van de bestaande uiteenlopende veiligheidsnormen zoals bv. de CE-norm, ontstoringskeurmerken, voorschriften in verband met gevaarlijke stoffen etc. en technische normen, dienen grensoverschrijdende leveringen vooraf met YAMAHA overeengekomen te worden”*.

<sup>37</sup> Article 10 of the distribution agreement with [ ... ]: *“Het recht van de contractant om handelsmerken, handelsnamen of andere YAMAHA kentekens te gebruiken, vervalt wanneer de contractant handelingen verricht die in strijd zijn met de inhoud van § 11 (internet), of de overeenkomst in zijn geheel beëindigd werd”*.

<sup>38</sup> File, p. 8381. Euro-distribution agreement with [ ... ] of 25 April 2000, § 11: *“Aufgrund nach wie vor unterschiedlichen Sicherheitsstandards, wie zB CE-Norm, Funkschutzzeichen, Gefahrstoffverordnung etc. und technischer Standards sind grenzüberschreitende Lieferungen im Vorwege mit Yamaha abzusprechen.”*

#### 1.5.1.4. Guarantees only valid in the country of origin

57. In Germany, Belgium and Denmark, the guarantee was only valid in the country of origin of the purchase.

(a) *Germany*

58. The Commission has found German guarantee cards for Clavinova Keyboards (YAM-EKB-07-98) which stated that:

*“1. The guarantee will only be granted to the first consumer and is only valid in the Federal Republic of Germany and Switzerland.*

*2. The deal must have been effected by an authorised Yamaha dealer in the Federal Republic of Germany or Switzerland.*

*3. The warranty document must be completed by the authorised Yamaha dealer. The data given on the guarantee document and the instrument must coincide”<sup>39</sup>.*

59. The German guarantee card is dated 07/98. In March 2002, a new Pan-European distribution agreement, establishing an EEA-wide guarantee, was notified to the Commission.

(b) *Belgium*

60. In Belgium, the Yamaha Benelux Brussels office only guaranteed the product for one year within the Benelux network. The guarantee card had to be received by this office within 15 days following the purchase. The text was as follows<sup>40</sup> :

*“Guarantee certificate*

*Important: The right to the guarantee is only valid if YAMAHA MUSIC BENELUX B.V.<sup>41</sup> is in possession of the reply coupon within 15 days following the purchase.*

*A purchaser wishing to have recourse to the guarantee must contact the YAMAHA distributor indicated on the back, together with this guarantee certificate. The distributor must, if necessary, call upon the technical service of YAMAHA MUSIC BENELUX B.V.*

*The guarantee becomes null and void in the case of repairs or interventions done by persons not approved for that purpose by YAMAHA MUSIC BENELUX B.V.”<sup>42</sup>*

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<sup>39</sup> File, p.314 bis.

*“1. Die Garantie wird nur dem in der Garantie- Urkunde eingetragenem Erstkäufer gewährt und gilt nur für die Bundesrepublik Deutschland und die Schweiz.*

*2. Der Kauf des Gerätes muß durch einen autorisierten Yamaha- Fachhändler in der Bundesrepublik Deutschland oder der Schweiz erfolgt sein.*

*3. Die Garantieurkunde muß von dem unter Ziffer zwei autorisierten Yamaha Fachhändler vollständig ausgefüllt sein. Die Angabe in der Garantie- Urkunde und auf dem Gerät müssen übereinstimmen.”*

<sup>40</sup> File, p. 11682. Conditions de garantie de l'appareillage électronique Yamaha.

<sup>41</sup> Yamaha Music Benelux B.V. was replaced in 1995 by Yamaha Music Nederland and Yamaha Music Belgium, which are branches of Yamaha Europa GmbH.

<sup>42</sup> “Certificat de garantie

61. There is no date on the guarantee card.
- (c) *Denmark*
62. Paragraph 6 of the standard distribution agreement concerning country-wide guarantees<sup>43</sup> stated:
- “Yamaha Profil-dealers and Yamaha Partner-dealers have the right to, and are obliged to, in all marketing of the company name to add “authorised Yamaha dealer”(…) which include that Yamaha, on top of the right to complain, offers one-year country-wide guarantee to the end-user on new products sold by “authorised” dealers to the end-user”<sup>44</sup>.*
63. The Danish standard agreement entered into force in April 1998. On 30 January 2001, Yamaha Scandinavia AB sent a circular letter to Yamaha Danish dealers explaining that the warranty was valid also for Yamaha products purchased in another EEA country.
- 1.5.1.5. Parallel trade provisions in Iceland
64. Article 4.01 of the exclusive distribution contract between Yamaha Scandinavia AB and the distributor [ ... ] signed in 1995 prohibited parallel imports and exports:
- “Distributor shall sell the products only within the TERRITORY (defined as the Republic of Iceland in article 1 of the distribution contract, ndlr) and shall not, directly or indirectly resell or reexport the PRODUCTS to any place or country outside the TERRITORY and shall not resell the products to any other person, firm or corporation in the TERRITORY in case, DISTRIBUTOR and/or EXPORTER knows or has reason to believe that said person, form or corporation is going to resell or reexport the PRODUCTS outside the TERRITORY. EXPORTER will exert its best efforts to prevent persons other than distributor from selling the products in the TERRITORY; provided, however, that exporter shall not be responsible for any unauthorised use of sale of the products, when such use or sale is caused by some third party who is not under control of EXPORTER<sup>45</sup>. ”*
65. This clause was declared null and void in a circular letter from Yamaha Scandinavia AB dated 30 January 2001.

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*Important : Le droit à la garantie est uniquement acquis si Yamaha Music Benelux BV est en possession du coupon réponse dans les 15 jours suivant l'achat*

*[...]*

*L'acheteur qui souhaite avoir recours à la garantie, doit s'adresser au distributeur YAMAHA renseigné au verso, muni du présent certificat de garantie. Le distributeur doit, si nécessaire, faire appel au service technique de YAMAHA MUSIC BENELUX B.V.*

*La garantie devient caduque au cas où des réparations ou des interventions sont effectuées par des personnes non habilitées à cet effet par YAMAHA MUSIC BENELUX B.V ».*

<sup>43</sup> File, pp. 11110 and 11150.

<sup>44</sup> *“Yamaha Profil-forhandlere og Yamaha Partner-forhandlere er berettiget og forpligtet til i al markedsføring af firmanavn at tilføje “autoriseret Yamaha forhandler” (...), hvilket indebærer, at Yamaha, udover ovennævnte reklamerationsret, yder et aars landsdækkende garanti overfor slutbruger paa nye produkter solgt af “autoriserede” forhandlere til slutbruger”.*

<sup>45</sup> File, p. 12822.

### 1.5.2. The pricing policy of Yamaha

66. It is apparent that in The Netherlands, Italy and Austria, some official Yamaha distributors have been restricted in their ability to determine their resale prices or discounts.

#### 1.5.2.1. Resale price maintenance in the Netherlands

67. Yamaha Music Benelux B.V, Amsterdam distributed Yamaha products in Belgium, Luxembourg and The Netherlands.

68. Article 2.2 of the distribution contract obliged the dealer to respect an internal guideline for shops<sup>46</sup>.

69. The “Guidelines of YMB for shops”<sup>47</sup> read as follow:

*“The dealer shall use in the shop or to the outside the recommended retail trade prices that are noted in the price list of Yamaha Music Benelux and respect the agreement reached between the Dealer and YMB with regard to this use.”*<sup>48</sup>

70. In a circular letter<sup>49</sup> dated February 1996 sent to YPAC (Yamaha Professionals Audio products) dealers, Yamaha Music Nederland stated that they would exclude certain instruments if the dealer allowed rebates above 15% of the listed price:

*“As of April 1997, the 02R, 03D and accessories will also be taken into account for calculating the rebate and turnover bonus arrangement. Such bonuses will however only be awarded, if the dealer uses the normal margins in his advertisements, or in advertisements caused by him, as well as in his offers: Note: advertising and promotion actions with more than 15% rebates is not considered as normal by us.”*<sup>50</sup>

71. The business relationship between Yamaha Music Nederland and the dealers is based on distribution agreements which have been in force until September 2000/February 2001, when the Euro distribution agreement entered into force.

#### 1.5.2.2. Resale price maintenance in Italy

72. The Italian price list showed “prices for the public”<sup>51</sup> and not “recommended prices”, and the contracts obliged the dealers not to use different price lists.

73. The standard 1997 contracts for digital pianos stated that:

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<sup>46</sup> File, p. 1228, Distribution contract between Yamaha Music Benelux B.V and [ ... ], 7 September 1988, portatone p.1245, Electrone Organs p.1252, PA pp.1271-1272; and Distribution contract [ ... ], blaasinstrumenten p.1203.

<sup>47</sup> File, p. 1203-1214, Dealer agreement between YMB and [ ... ].

<sup>48</sup> File, p. 1235. Dealer Overeenkomst Yamaha Music B.V with [ ... ].

<sup>49</sup> *Standaard-richtlijnen van YMB: “De Dealer zal in de Winkel of naar buiten toe de in de prijslijst van Yamaha Music Benelux B.V. genoteerde advies-detailhandelsprijzen hanteren en de daaromtrent tussen de Dealer en YMB bereikte overeenstemming handhaven”.*

<sup>50</sup> File, p.13522.

<sup>51</sup> *“Met ingang van april 1997 worden de 02R, 03D en toebehorden eveneens betrokken in de korting en omzet- bonusregeling. Deze worden echter alleen dan toegekend als de dealer in haar of door haar veroorzaakte reclame uitingen en offertes de normale marges hanteert: Noot: reclame-uitingen en acties met meer dan 15% korting worden door ons als niet normaal beschouwd”.*

See e.g. price list, p. 2927.

*“The dealer takes explicit note that the general terms of sale of Yamaha Italy foresee the prohibition, unless authorised, to publish or to announce in whichever form prices different from those indicated in the official price lists. The breach of contract foresees automatically the annulment of all rebates.”<sup>52</sup>*

74. Article 5(12) of the 1992 distribution contract for pianos stated that “Authorised dealers can freely establish their own prices applied to end-users”. However, article 5(10) of the same contract read:

*“The authorised buyer undertakes not to reproduce advertising material and price lists different from the original, without approval of Yamaha Musica Italia s.p.a. For infringements of this clause Yamaha Musica Italia reserves itself the right to take any action to protect its own interests.”<sup>53</sup>* Therefore heavy sanctions were foreseen to implement the obligation to respect the prices.

75. The “General conditions of sales” for the years 1997<sup>54</sup> up to 2000<sup>55</sup> read:

*“The buyer, whether authorised dealer or retailer, commits himself not to reproduce advertising material and price lists different from the original, without approval of Yamaha Musica s.p.a. For infringements of this clause Yamaha Musica Italia reserves itself the right to take any action to protect its own interests.”<sup>56</sup>*

76. The price lists themselves contained at the last page a “synthesis of the General conditions of sales” saying:

*“NB: It is prohibited to reproduce price lists, printed material and advertising material which include prices different from the price lists in force. In case of infringement Yamaha Musica Italia is entitled to undertake any action in order to protect its own interests”.<sup>57</sup>*

77. The agreement for professional audio signed in 1997 stated:

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<sup>52</sup> See Yamaha Musica Italia s.p.a. - Divisione keyboards e multimedia 1997, signed 11 February 1997 p.3992 or documents p. 3984, p.3986, p.3990;

See Yamaha musica Italia s.p.a. - Divisione keyboards e multimedia 1997 signed 1 February 1996 p.4056, (Clavinova);

*“Il rivenditore prende atto espressamente che le condizioni generali di vendita della Yamaha Musica Italia Spa prevedono il divieto, salvo autorizzazione, di pubblicare o pubblicizzare in qualsiasi modo prezzi diversi da quelli indicati nei listini ufficiali. L’inadempimento prevede il decadimento automatico di tutti gli sconti”.*

<sup>53</sup> “Contratto di distribuzione selettiva per i pianoforti verticali- a coda e disklavier distribuiti dalla Yamaha [ ... ], March 31 March 1992, p. 3013.

*“10) Il Rivenditore Autorizzato si impegna a non riprodurre stampati propagandistici e listini prezzi diversi dagli originali senza il benestare della Yamaha Musica Italia S.p.A. Per la infrazione alla presente clausola la Yamaha Musica Italia S.p.A. si riserva di intraprendere ogni azione atta a tutelare i propri interessi.*

<sup>54</sup> For 1997 see p.4004.

<sup>55</sup> For 2000 see p.3825, for 1999 p.3908, for 1998 see p.3970.

<sup>56</sup> *“L’acquirente, se concessionario o rivenditore, si impegna a non riprodurre stampati propagandistici e listini prezzi diversi dagli originali, senza il benestare della Yamaha Musica Italia s.p.a. Per la infrazione alla presente clausola la Yamaha Musica Italia s.p.a. si riserva di intraprendere ogni azione a tutela dei propri interessi”.*

<sup>57</sup> File, p.3594 *“NB: È vietata ai rivenditori la riproduzione di stampati, pubblicità e listini con prezzi diversi da quelli qui indicati. Per infrazioni la YAMAHA MUSICA ITALIA si riserva di intraprendere ogni azione a tutela dei propri interessi”*(bold in original document).

*“The commercial terms indicated above are only valid under complete compliance with the duties of stocks and under respect of the prices indicated in the list for professional audioPA in the sale areas, the quotations and information material.*

*NB: It is prohibited to reproduce price lists, printed material and advertising material which include prices different from our price lists in force (See page 10 of the general sales terms of Yamaha Musica Italia)<sup>58</sup>”.*

78. A document titled “target division combo” constituting the business plan for a year and identifying bonuses contained the same provisions.<sup>59</sup>

79. Furthermore, an annex to the contract between Yamaha Musica Italia and an Italian dealer [ ... ], dated 18 July 2000 and designed to be signed by both parties, stated:

*“ Prices: Net prices as in Yamaha’s list. Prices for the public will be determined directly with Yamaha Musica Italia on the basis of the time period and market conditions ”<sup>60</sup>.*

80. On 9 January 2001, Yamaha Musica Italia s.p.a. sent to all Italian dealers a circular letter declaring the paragraph 1561 of the General Conditions of Sales null and void and stating that dealers should be free to determine their resale prices. On 27 December 2000, Yamaha Musica Italia s.p.a. also sent to [ ... ] a letter declaring the clause stating that prices for the public should be determined directly with Yamaha Musica Italia s.p.a. null and void.

#### 1.5.2.3. Resale price maintenance in Austria

81. A contract signed with three dealers contained a clause which directly fixes prices:

*“Yamaha transfers the right to the agreed distributor to sell on oboes and bassoons to specialised dealers without a contract for the oboes and bassoons. The further sale price to these dealers will be calculated as follows: Your net purchasing price x 1,0877= net purchasing price distributor.”<sup>62</sup>*

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<sup>58</sup> *“Le condizioni commerciali sopra indicate si intendono valide solo nel pieno rispetto dell’impegno di stoccaggio ed all’osservanza dei prezzi indicati nel listino Professional P.A. negli ambiti di vendita, preventivi ed informazioni”.*

*NB: È vietata la riproduzione di listini, stampati, pubblicità che riportino prezzi diversi da quelli indicati sui nostri listini in vigore (vedi p10 delle condizioni generali di vendita YMI) [bold in original document].*

<sup>59</sup> File, p.3982, [ ... ] signed 8.5.97; identical p.3981 [ ... ], Target striemto a foatop e percussioni p.3976.

<sup>60</sup> *“Prezzi: Netti come da Listino Yamaha. I prezzi al pubblico verranno concordati direttamente con Yamaha Musica Italia s.p.a. in base al periodo considerato ed alle condizioni di mercato in essere.*

<sup>61</sup> Paragraph 15 of the General Conditions of sales states: *“The buyer, whether authorised dealer or retailer, commits himself not to reproduce advertising material and price lists different from the original, without approval of Yamaha Musica s.p.a.”. “L’acquirente, se concessionario o rivenditore, si obbliga a non riprodurre stampati propagandistici e listini prezzi diversi dagli originali, senza il benestrare della Yamaha Musica Italia s.p.a.”*

<sup>62</sup> File, p.11031. Vertriebsvertrag f. Yamaha Oboen & Fagotte zwischen Yamaha Europa GmbH Zweigniederlassung Wien und der Firma [ ... ] 1 December 1999

*“§ 1, 2 Yamaha überträgt dem Stützpunkthändler das Recht, Oboen und Fagotte auch an Fachhändler ohne Oboen & Fagotte Vertrag weiter zu verkaufen. Der Weiterverkauf an diesen Händler wird wie folgt berechnet: IHR NETTO EK x 1,0877= Netto EK Händler”.*



82. A circular letter was sent by Yamaha on 1 February 2001 explaining that this clause was not binding.

## 2. LEGAL ASSESSMENT

### 2.1. Article 81(1) of the Treaty and 53(1) of the EEA Agreement

83. Article 81(1) of the Treaty prohibits all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix selling prices or any other trading conditions and share markets or sources of supply. Article 53(1) of the EEA Agreement contains parallel provisions relating to trade between contracting parties and effect on competition within the EEA.
84. It is settled case-law that for the purpose of the application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement there is no need to take account of the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market or the EEA, respectively. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved<sup>63</sup>.
85. In cases falling under Article 81 of the Treaty and Article 53 of the EEA Agreement, wherever there is an appreciable restriction of competition and effect on trade within the Community, the Commission is responsible for the case, including responsibility for the EEA aspects. Pursuant to Article 56(1)(c) of the EEA Agreement <sup>64</sup> the Commission is therefore the competent Authority to intervene.

#### *2.1.1. Agreements and/or concerted practices between undertakings having as their object or effect the prevention, restriction or distortion of competition*

86. The distributors appointed as official Yamaha distributors, and Yamaha Corporation Japan, including its subsidiaries, which manufacture or purchase products for resale, are undertakings within the meaning of Article 81(1) of the Treaty and 53(1) of the EEA Agreement.
87. Agreements between Yamaha's European subsidiaries and official Yamaha distributors constitute agreements and/or concerted practices between undertakings within the meaning of Article 81(1). Instructions given by Yamaha's subsidiaries to their contractual distributors within the official network also constitute agreements and/or concerted practices and are not unilateral acts which would escape the prohibition contained in Article 81(1) of the Treaty and 53(1) of the EEA Agreement. According to the established case law<sup>65</sup>, admission to a distribution

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<sup>63</sup> See Judgment of the Court in Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission*, [1966] ECR 299; and Judgment of the Court in Case C-219/95 *Ferriere Nord v Commission*, [1997] ECR I-4411, paragraphs 12, 13 and 14.

<sup>64</sup> Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 1

<sup>65</sup> Judgment of the Court in Case 107/82 *AEG v Commission*, [1983] ECR .3151 at p. 3195; Judgment of the Court in Joined cases 25 and 26/84 *Ford v Commission*, [1985] ECR 2725 at page 2743; and the

network implies that the contracting parties explicitly or implicitly accept the distribution policy of a manufacturer. The circulars and instructions are therefore part of the agreements between Yamaha's subsidiaries and their authorised dealers, since they are to be regarded as part of a set of continuous business relations based on an existing general agreement. Admission to Yamaha's network, governed by an agreement drawn up in advance, implies acceptance by distributors of the policy communicated by Yamaha which they have followed by adjusting their behaviour in the market according to these instructions.

88. Yamaha's European subsidiaries and their official distributors have implemented various agreements and/or concerted practices which have as their object or effect the restriction of competition in different Member States and EEA contracting parties, within the meaning of Article 81(1) of the Treaty and 53(1) of the EEA Agreement. These restrictions are the following:

- (a) obligations on official distributors to sell only to final customers;
- (b) obligations on official distributors to purchase exclusively from the Yamaha national subsidiary;
- (c) obligations on official distributors to supply solely distributors authorised by the national subsidiary of Yamaha;
- (d) obligations on official distributors to contact Yamaha before exporting via the internet;
- (e) territorial protection concerning the manufacturer's guarantees;
- (f) restrictions of parallel trade in Iceland;
- (g) restrictions concerning resale prices or minimum price levels for goods purchased from Yamaha's subsidiaries for resale by official Yamaha distributors in The Netherlands, Italy and Austria.

#### 2.1.1.1. Partitioning of national markets

(a) *Obligations on Yamaha's distributors to sell exclusively to final customers*

(i) Restrictive object

89. The obligation on German, Italian and French dealers (recitals 31-40) to sell exclusively to final consumers has the object of preventing cross supplies within the network of Yamaha dealers. This obligation constitutes a restriction of competition within the meaning of Article 81(1) of the Treaty and 53(1) of the EEA Agreement as it restricts dealers in competing for sales to other dealers and impedes trade within the distribution network. It prevents supplies to other authorised retailers within the Community<sup>66</sup>, thereby precluding horizontal trade with other dealers. The

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Judgment of the Court of First Instance in Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707 at paragraph 236.

<sup>66</sup> See *Rodenstock/Metzler*, Fifteenth Report on Competition Policy (1985), point 64 and 65; *Mitsui/Bridgestone*, *ibid*, point 60; and also *Interlühke*, *ibid*, at point 61 where both a positive obligation

prohibition on cross supplies restricts competition because it seriously impedes the economic freedom of authorised dealers<sup>67</sup>.

90. In its reply to the Statement of Objections<sup>68</sup>, Yamaha submits that provided retailers are free to supply end users outside their territory, a restriction on supplies between dealers (in the form of obligations to sell only to end users, to purchase only from the Yamaha national subsidiary or not to supply or purchase from authorised dealers in other Member States) in a single-tier distribution system does not have the object of restricting competition because it prevents a serious distortion in the distribution system that would result from cross-dealer supplies. In a single-tier distribution system, a ban on cross-dealer supplies is analogous to the restriction on supplies by wholesalers to end users in a two-tier system which was found to fall outside the scope of Article 81(1) in both the Metro I judgment<sup>69</sup> and Villeroy and Boch Commission Decision<sup>70</sup>. This is because in a single-tier system retailers, if allowed to supply other retailers, could take over the supplier's function as an importer-distributor or wholesaler.
91. Furthermore, referring to the conclusions in the study undertaken by Frontier Economics<sup>71</sup>, Yamaha states that there are a number of factors specific to Yamaha's products –such as high transport costs, low volumes, credit risks, the high costs of maintaining inventory and the small size of single outlet retailers- which rule out dealer-to-dealer sales as an efficient means of providing consumers with lower priced goods from other Member States. In most circumstances, cross-dealer supplies will not be economically interesting because the price differences between manufacturer-to-dealer and dealer-to-dealer supplies are not likely to be sufficient to overcome the costs of dealer-to-dealer trade. In the rare case where the price differences are large enough to make such trade profitable, it is unlikely that the importing dealer will have an incentive to lower the price to the consumer. Consequently, the most likely and efficient route of supply will be from the exporting dealer direct to the end user. As long as the dealers are free to supply end users in other Member States, the restrictions on cross-dealer supplies, therefore, had neither the object nor the effect of restricting either competition or parallel trade.
92. The Commission considers that Yamaha's arguments are not acceptable. A prohibition of sales between authorised dealers constitutes a restriction of their economic freedom and, consequently, a restriction of competition. The fact that the manufacturer never actually intervened to prevent exports by its dealers is not sufficient to preclude the existence of a clear prohibition of exports<sup>72</sup>. In this respect, the inclusion in a selective distribution agreement of an exclusive purchasing

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to sell only to end-users and a prohibition on cross-supplies to other dealers were held to fall within Article 85(1).

<sup>67</sup> Judgment of the Court in Case 86/82, *Hasselblad (GB) Limited v Commission of the European Communities*, [1984] ECR 883.

<sup>68</sup> See Yamaha's reply to the Statement of Objections, 5 August 2002, p. 9-13.

<sup>69</sup> Judgment of the Court in Case 26/76. *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, [1977] ECR 1875, Paragraph 29.

<sup>70</sup> Commission Decision of 16 December 1985 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.665 - Villeroy & Boch), Paragraph 36, OJ L 376, 31.12.1985 p. 15.

<sup>71</sup> Annex 6 to Yamaha's reply to the Statement of Objections, Study submitted by Frontier Economics, *Dealer-to-dealer trade in musical instruments in Europe*.

<sup>72</sup> See Judgment in *Hasselblad* cited above, paragraph 46.

provision according to which authorised dealers are obliged to source the contract product only from a designated supplier is considered to infringe Article 81(1).

93. There is no analogy between a ban on cross-dealer supplies in a single-tier distribution system and a ban on wholesalers supplying end users in a two-tier distribution system. In the “Metro I” judgment and the Decision in Villeroy & Boch, the prohibition on wholesalers supplying private customers was found to fall outside the scope of Article 81 for the following reason: competition would be distorted if wholesalers, whose costs are in general proportionally lower precisely because of the marketing stage at which they operate, would compete with retailers at the retail stage, in particular on supplies to private customers. In this case, the dealers are all retailers acting at the same marketing stage, with similar marketing costs. Consequently, in a one-tier distribution system, there would be no distortion of competition, or of the distribution chain, if one retailer decides to supply other retailers. The clause in question is not designed to protect the distribution chain but to preclude horizontal trade and to impede retailers from competing with each other. In any event, in so far as it prevents cross-dealer supplies in all circumstances it goes beyond what is necessary to ensure that retailers do not take over the wholesaler/importer functions.
94. It is established case law that, for the purposes of Article 81(1) of the Treaty, it is sufficient that the relevant clause, as in the present case, has the object of restricting competition. It is not necessary to show that it actually produces any restrictive effects<sup>73</sup>. Without however, entering into details concerning the effects of such a clause, the arguments according to which cross-dealer supplies (because of the insufficient cross-country trade price differentials, the nature of the Yamaha products, high transport costs, the small size of Yamaha’s retailers and various disincentives to cross border trade between dealers) would not be economically viable are highly questionable. The studies undertaken by Frontier Economics itself show that for certain products, large price differentials can be observed, which would make cross dealer sales possible. The figures of the study concerning the “dealer-to-dealer” trade show that for acoustic pianos, for instance, trade prices are found to lie within +/- 5% of the median European price for the United Kingdom, The Netherlands, Germany, France and Austria. For Sweden, Spain, Italy and Belgium, trade prices are found to lie within +/-10% of the median price. In a number of years, trade price differentials can even reach 20%<sup>74</sup>. Therefore, price differentials between dealers in different Member States, and not vis-à-vis a theoretical “median European price”, are, however substantial<sup>75</sup>. Indeed, the reference to a median European price is not relevant for the analysis since such a price does not exist and what should be taken into consideration is the differentials of trade prices between dealers. Moreover, important discounting off price list is extremely common, with discounts from 20 to 40%<sup>76</sup>. The studies concerning dealer discounting within Germany and

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<sup>73</sup> See, for example, Judgment of the Court of First instance in Case T-143/89, *Ferriere Nord v Commission*, [1995] ECR II-917; Judgment of the Court of First instance in Case T-62/98 *Volkswagen v Commission*, [2000] ECR II-2707, paragraph 178; Judgment of the Court of First Instance in Case T-176/95, *Accinauto v Commission*, [1999] ECR II-1635, paragraph 106; Commission notice “Guidelines on vertical restraints”, OJ C 291, 13.10.2000, p. 1, paragraph 7.

<sup>74</sup> Annex 6 of Yamaha’s reply to the Statement of Objections: Study submitted by Frontier Economics on *Dealer-to-Dealer trade*, p. 17.

<sup>75</sup> See also the Study by Frontier Economics on *Cross-country price differentials and alleged restrictions on dealer-to-dealer trade*, submitted by Yamaha on 31 January 2003.

<sup>76</sup> *Ibid*, p. 21.

Italy also show “considerable variation in the prices offered by dealers”<sup>77</sup>. Besides, as evidenced by Yamaha, many dealers are engaged in substantial cross-border sales to end-users<sup>78</sup>. This proves that the transport costs are not necessarily an obstacle and that dealers have the resources and administrative capabilities necessary to engage in cross-border sales activities. Consequently, such a ban on cross-dealer supplies is capable of having an effect, both on competition and on parallel trade.

95. The restriction on cross-dealer supplies, in the form of obligations to sell only to end users, to purchase only from the Yamaha national subsidiary or not to supply or purchase from authorised dealers in other Member States, is therefore a restriction by object.

(ii) Duration of the restriction

96. In Italy, the restriction can be proved from March 1992 to October 1996<sup>79</sup>.
97. In Germany, the restriction can be proved from June 1977<sup>80</sup> to March 2000, the date of entry into force of the Euro-distribution Agreement.
98. In France, the restriction can be proved from March 1989<sup>81</sup> to December 1996<sup>82</sup>.
- (b) *Obligations on Yamaha’s distributors to buy solely from the Yamaha national subsidiary*

(i) Restrictive object

99. The obligation for the Yamaha authorised dealers in Italy and France (recitals 35-40) to obtain supplies exclusively from the national subsidiary, and not from other potential suppliers within the national or European Yamaha official dealer network, constitutes a restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. For the reasons explained above (recitals 89-95), this obligation has the object of preventing cross supplies between authorised dealers from the same country and from one Member State to another Member State within such network. It has the result of sheltering the Italian and French distribution networks from such cross supplies, thereby restricting competition.

(ii) Duration of the restriction

100. In France, the obligation to buy exclusively from Yamaha Musique France S.A. can be proven between March 1989<sup>83</sup> and December 1996<sup>84</sup>.

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<sup>77</sup> Annex 18 of Yamaha’s reply to the Statement of Objections, Study submitted by Frontier Economics on *Dealer discounting in Germany*, p. 2.

<sup>78</sup> See Yamaha’s reply to the Statement of Objections, p. 43-46.

<sup>79</sup> Distribution contract with [ ... ] for pianos of 31 March 1992, ended in October 1996.

<sup>80</sup> Distribution agreement with [ ... ] of 16 June 1977 (Holz- und Blechblasinstrumente, Gitarren, Elektro-Gitarren, Verstärker, Combo-Orgeln, Synthesizer, Schlagzeuge, Combo-pianos).

<sup>81</sup> Distribution contract for pianos between Yamaha Musique France SA and [ ... ] dated March 3, 1989.

<sup>82</sup> In the new distribution contract between Yamaha Musique France SA and [ ... ] dated February 24, 1997, the obligation to sell to final customers does not appear any longer.

<sup>83</sup> Distribution contract for pianos between Yamaha Musique France S.A. and [ ... ] dated March 3, 1989.

<sup>84</sup> In the new distribution contract between Yamaha Musique France S.A. and [ ... ] dated February 24, 1997, the obligation to buy solely from Yamaha Musique France S.A. does not appear any longer.

101. In Italy, the obligation to buy exclusively from Yamaha Musica Italia s.p.a. can be proven between March 1992 and October 1996<sup>85</sup>.

(c) *Obligations on Yamaha's distributors to supply solely distributors authorised by the national subsidiary of Yamaha*

(i) Restrictive object or effect

102. In France, the authorised dealers were obliged "to buy pianos exclusively from Yamaha France or another dealer authorised by Yamaha France" (recitals 42-43). The Austrian, Belgian and Dutch contracts oblige the dealers to sell products only to dealers authorised by the national subsidiary of Yamaha (recitals 44-50). These contracts have the object of defining national distribution networks. As explained above (recitals 89-95 and 99), it prevents the dealers from purchasing Yamaha instruments from other authorised dealers in other Member States. It has the object of partitioning national markets and sheltering the markets concerned from cross supplies, thereby restricting competition and infringing Article 81(1) of the Treaty and 53(1) of the EEA Agreement.

103. Yamaha does not dispute the existence of these contractual provisions. However, it does not accept the Commission's interpretation of the Euro distribution agreement<sup>86</sup>. Yamaha submits that, as drafted, the provisions did not prevent Austrian, Belgian, Dutch and German dealers from supplying each other. In the Austrian, Belgian and Dutch agreements "Yamaha" was defined as Yamaha Europa GmbH and/or as Yamaha Europa GmbH and the relevant branch or subsidiary. As a result, the agreements permitted cross supplies between dealers in Germany, Austria, Belgium and The Netherlands.

104. The clause contained in the French contract restricts competition by defining a national distribution network and it allows no room for interpretation. As regards the Austrian, Belgian and Dutch agreements, the Commission acknowledges that these agreements may be open to different interpretations. However, it is obvious that the Austrian, Belgian and Dutch dealers may have been confused by such a clause, especially since there was a clear ban in a neighbouring country (France) on supplying or purchasing from authorised dealers in other Member States, and such bans had also existed in a number of Member States. This may have had the effect of discouraging cross-supplies among dealers in Germany, Austria, Belgium and the Netherlands. In any event, the clause clearly prohibited cross-supplies between dealers in these countries and other countries.

(ii) Duration of the restriction

105. In France, the restriction can be proved from February 1997<sup>87</sup> to March 2002.

106. The restriction can be proved from March 2000 in Austria<sup>88</sup>, from March 2000 in Belgium<sup>89</sup> and from October 2000 in The Netherlands<sup>90</sup> to March 2002, date of expiry of the Euro distribution agreement.

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<sup>85</sup> Selective Distribution contract between Yamaha Musica Italia s.p.a. and [ ... ], 31 March 1992, ended in October 1996.

<sup>86</sup> Yamaha's reply to the Statement of Objections, p. 15-16.

<sup>87</sup> Distribution contract between Yamaha Musique France S.A. and [ ... ] dated 24 February 1997, or same contract between Yamaha Musique France S.A. and [ ... ], 11 February 1997.

(d) *Obligations on Yamaha's distributors to contact Yamaha Europa GmbH, Germany, before exporting via the Internet*

(i) Restrictive object or effect

107. Article 11 of the new Austrian, Belgian and German distribution contracts signed in 2000, obliged the dealer to contact Yamaha Europa GmbH –or one of its branches– before exporting goods via the Internet because of divergent security standards, such as standards for the protection of radio frequencies, the dangerous materials regulation and technical standards (recitals 51-56). As a consequence, the dealers were clearly discouraged from exporting if they had first to inform Yamaha Europa GmbH or one of its branches. The obligation on Yamaha's distributors to contact Yamaha Europa GmbH, Germany, before exporting via the Internet therefore reinforces market partitioning and constitutes an infringement contrary to Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.
108. In its reply to the Statement of Objections, Yamaha notes that the alleged clause required dealers to consult Yamaha before exporting and that the wording in no way discouraged or prevented dealers from exporting. Moreover, Yamaha sent letters in January 2001 to state that the clause in question did not apply to supplies within the EEA and that the dealer had to contact Yamaha's subsidiary only in case of exports outside the EEA. Besides, Yamaha Europa sent a letter in April 2000 to the German dealer association which had requested Yamaha to clarify the meaning of the internet clause, in which Yamaha explained that failure to comply with this Internet clause would not lead to the termination of any contracts or to any other sanctions<sup>91</sup>.
109. The Commission sees no reasons to justify such an obligation to consult Yamaha before exporting via the internet and interprets this clause as deterring exports via the internet. The fact that the dealers were discouraged from exporting if they had first to inform Yamaha Europa GmbH is clearly corroborated by the fact that the German dealer association interpreted the clause as a means to control exports and expressed its concerns, and twice requested Yamaha to clarify the meaning of the Internet clause<sup>92</sup>. Although the object of the agreement may not have been to directly restrict exports, it clearly had the potential effect of discouraging dealers from exporting products to other Member States. According to the settled case-law of the Court, in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute. However, Article 81(1) does not restrict such an assessment to actual effects alone; it must also take account of the agreement's potential effects on competition within the common market.<sup>93</sup> As far as the products concerned are musical instruments, it seems indeed excessive to invoke the security norms and the clause on dangerous products before exportation. Indeed, such limitations existed only for exports arranged via the internet, and there is no reason

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<sup>88</sup> Distribution contract with [ ... ], 28 March 2000.

<sup>89</sup> Distribution contract with [ ... ], 14 March 2000.

<sup>90</sup> Euro-distribution agreement between Yamaha Europa GmbH and [ ... ], 20 October 2000.

<sup>91</sup> Yamaha's reply to the Statement of Objections, p. 16-18 and 39.

<sup>92</sup> Yamaha's reply to the Statement of Objections, paragraphs 186-188.

<sup>93</sup> Judgment of the Court in Case C-7/95, *John Deere Ltd v Commission of the European Communities*, [1998] ECR p.3111, paragraphs 76-77.



why they should be limited to such situations if concerns were really related to security norms. In April 2000, following concerns expressed by German dealers, Yamaha sent a letter to the German dealers' association stating that the failure to comply with the internet clause would not lead to the termination of any contracts or other sanctions. However, in 2000, only 41.8%<sup>94</sup> of Yamaha German dealers belonged to the German dealers' association. Consequently, 58.2% of the German dealers, as well as the dealers in Austria, Belgium and The Netherlands were not informed of such a policy until the circular letters of January 2001.

(ii) Duration of the restriction

110. The contracts in the Commission's possession were signed in March 2000 in Austria and Belgium and in April 2000 in Germany. Several months later, circular letters (dated December 2000 for Belgium, 5 January 2001 for Germany, 8 January 2001 for Austria) were sent to dealers. Consequently, the restrictions can be proven from March 2000 to December 2000 in Austria and Belgium, and from April 2000 to 5 January 2001 in Germany.

(e) *Territorial restrictions concerning the manufacturer's guarantee*

(i) Restrictive object or effect

111. In Denmark, Germany and Belgium, the guarantee was only valid in the country of origin of the purchase (recitals 57-63). In Denmark, the restrictive clause concerning guarantee is directly contained in the contract. In Belgium and Germany, the restrictive clauses are mentioned on the guarantee cards, but the guarantee cards of the Yamaha products are part of the contractual relationship between Yamaha and its dealers. The Commission has repeatedly stated that a manufacturer's guarantee must be applicable throughout the Community, irrespective of the Member State where the product was purchased. In a series of decisions, the Commission has required that where the manufacturer gives a guarantee on branded goods, the service covered by that guarantee must be available from any approved dealer, not merely the dealer from which it was purchased. In the Zanussi decision<sup>95</sup>, the Commission has indeed established that the practice of not extending the guarantee to parallel imports and exports might constitute a major obstacle to the development of trade within the Community and must consequently be prohibited. This has been confirmed by the Court of Justice in the Swatch case<sup>96</sup>. In that case the Court held that clauses inserted in an exclusive distribution agreement, whereby the manufacturer's guarantee is to be withheld from customers of parallel importers, must be regarded as having the object or effect of restricting competition within the meaning of Article 81(1) of the Treaty.
112. It follows that a guarantee which is only valid in the country of origin of the purchase constitutes a restriction of competition to the extent to which it has as its object and/or effect the partitioning of national markets and the reinforcement of territorial protection. Yamaha's provisions concerning guarantee had the effect of placing the

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<sup>94</sup> Yamaha's reply to the Commission's request for information, 2.01.2003, p. 7.

<sup>95</sup> Commission Decision 78/922/EEC of 23 October 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/1.576 – Zanussi).

<sup>96</sup> Judgment of the Court in Case 31/85 *ETA Fabriques d'Ebauches v SA DK Investment and others* [1985] ECR p. 3933



distributors in Denmark, Germany and Benelux in a privileged position with respect to parallel imports and constituted a barrier to trade within the Community.

113. In its reply to the Statement of Objections, Yamaha points out that its new pan-European distribution agreement, notified to the Commission on 5 March 2002, expressly requires dealers to honour the Yamaha guarantee for any products purchased within the EEA. Yamaha does not dispute the wording of the Belgian and German guarantee cards nor of the 1996 Danish agreement, but questions the significance attributed by the Statement of Objections to those documents, which do not reflect Yamaha's policy in Europe. Yamaha states that Article 6 of the 1988 standard agreement between Yamaha Music Benelux B.V. and Belgian dealers expressly required the latter to honour the Yamaha warranty irrespective of where the product was purchased. In addition, Article 5 of the standard distribution agreement applied in Germany required dealers to provide efficient customer service without any limitations on the origin of the customer or purchase. Yamaha considers that the language of those agreements clearly overrides the language of the guarantee card and makes it clear that Yamaha's policy was to provide for EEA-wide guarantees. Yamaha's pan-European guarantee policy was further confirmed in a 1993 letter from Mr. Chatani, managing director of Yamaha Europa, to the European subsidiaries informing them of the establishment of a pan-European guarantee system. Furthermore, starting in 1975, Yamaha Europa had entered into agreements with independent service centers to provide guarantee repairs on Yamaha products. Under those agreements, qualification for the guarantee service was to be evidenced either by the guarantee card or the receipt establishing the date of purchase. A guarantee card was thus not required to qualify for the Yamaha guarantee. As regards Denmark, Yamaha acknowledges that the clause in question constitutes a restriction of competition, but states that third-party service centers were established starting in 1991. Yamaha further submits guarantee reports from different Member States showing that some guarantees have been honoured irrespective of the country of origin of the purchase<sup>97</sup>.
114. The arguments of Yamaha are difficult to accept. First, the Belgian agreement quoted by Yamaha is not a "standard" distribution agreement in Belgium since other contracts from the same period are different and do not contain the same clause<sup>98</sup>. Yamaha claimed that those other contracts were only appendices of contracts, but such an explanation cannot be accepted since they have the structure of a contract. In any event, even if some contracts required dealers to provide an EEA-wide guarantee, the final consumer, who was only in possession of the restrictive guarantee card, would not have been aware of such stipulations. Secondly, Article 5 of the standard German distribution contract in question is not as clear as Yamaha claims, since it only states that "the party to a contract is obliged to maintain an efficient customer service corresponding to the scope of his business ensuring a permanent professional and correct maintenance of the end users", without any reference to the guarantee or origin of the customer. Thirdly, sporadic guarantee reports are not sufficient to override the language of the guarantee cards nor of the Danish contract. Lastly, the 1993 letter from Mr. Chatani was sent to the European

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<sup>97</sup> Yamaha's reply to the Statement of Objections, p. 18-21, 40, 47-50.

<sup>98</sup> Distribution agreement between Yamaha Music Benelux and [ ... ] ,dated 6 October 1989, document Y166A.

subsidiaries, but there is no indication that the information was passed on to the dealers.

115. The wording of the guarantee cards, and of the Danish distribution contract, is sufficiently clear to establish the restriction of competition and does not offer room for interpretation.

(ii) Duration of the restriction

116. The German guarantee card for Clavinova Keyboards, stating that the guarantee is only valid for Germany and Switzerland, is dated 07/98. The Commission has no evidence of the exact duration of the infringement. However, the restriction lasted at least one year, which corresponds to the duration of the guarantee mentioned on the card.
117. The Belgian guarantee is only valid for one year if the guarantee card has been received within 15 days after the purchase of the product by the Yamaha Benelux Brussels office. There is no date on the guarantee card. Consequently, the Commission has no evidence of the exact duration of the infringement. However, the restriction lasted at least one year, which corresponds to the duration of the guarantee mentioned on the card.
118. The Danish standard Agreement valid from April 1998 stated that the guarantee was only valid for the Danish territory. This restriction ended on 30 January 2001, when Yamaha Scandinavia AB sent a circular letter to explain that the warranty was now also valid for products bought in another EEA country. Consequently, the restriction in Denmark can be proved from April 1998 to 30 January 2001.

(f) *Restrictions of parallel trade in Iceland*

(i) Restrictive object

119. Article 4.01 of the distribution contract between Yamaha Scandinavia AB and [ ... ] stated that the distributor should sell the products only within the territory of Iceland and should not directly or indirectly resell or export the products to any place or country outside the territory (recitals 64-65). The clauses of the Iceland distribution contract constitute clear infringements of Article 81(1) of the Treaty and 53(1) of the EEA Agreement in so far as they directly prevent parallel exports, partition the EEA market and restrict competition.
120. According to the Court, “an agreement intended to deprive a reseller of his commercial freedom to choose his customers by requiring him to sell only to customers established in the contractual territory is restrictive of competition within the meaning of Article 85(1) of the Treaty”. Furthermore “an agreement which requires a reseller not to resell contractual products outside the contractual territory has as its object the exclusion of parallel imports within the Community and consequently, a restriction of competition in the Common market. Such provisions, in contracts for the distribution of products within the Community, therefore constitute by their very nature a restriction of competition”<sup>99</sup>.

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<sup>99</sup> Judgment of the Court of 28 April 1998, *Javico International and Javico AG v Yves Saint Laurent Parfums SA*, Case C-306/96, ECR 1998 p.I-01983 paragraphs 13 and 14.

121. The restriction of parallel exports is conceded by the parties in the reply to the Statement of Objections. However, Yamaha notes that the specific market circumstances in Iceland, that is to say, the tiny size of the market, remote location and high transport costs involved when shipping from Iceland to other EEA Contracting Parties and vice versa make it unlikely that this clause could have had the effect of restricting exports from Iceland into the rest of the EEA. Given these factors, Yamaha submits that Article 4.01 could not have had any appreciable effect on intra-EEA trade<sup>100</sup>.
122. The Commission considers that Yamaha's arguments are not convincing. It has been clearly established by the Court that "in prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition, Article 81(1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect"<sup>101</sup>. It is therefore established case law that, for the purposes of Article 81(1), it is sufficient that the relevant measure, as in the present case, has the object of restricting competition. It is not necessary to show that it actually produces any such restriction<sup>102</sup>. This is a restriction by object.

(ii) Duration of the restriction

123. The distribution contract between Yamaha Scandinavia AB and [ ... ] was signed on 1 September 1995. The restriction ended on 30 January 2001, when Yamaha Scandinavia AB sent a circular letter to declare Article 4.01 of the agreement null and void. Consequently, the restriction in Iceland can be proved from 1 September 1995 to 30 January 2001.

2.1.1.2. Resale price maintenance

(a) *Resale price maintenance in The Netherlands*

(i) Restrictive object

124. The distribution contracts signed by Yamaha Music Benelux and the dealers contained a clause obliging the dealer to apply the guidelines concerning shops. These guidelines stated that the dealer "shall use in the shop or to the outside the recommended retail trade prices that are noted in the price list of Yamaha Music Benelux". Therefore, they were part of the agreement. Furthermore, Yamaha Music Nederland sent a circular letter to YPAC dealers dated February 1996 stating that advertising and promotion actions with more than 15% rebates are not considered as normal by Yamaha (recitals 67-71).
125. It is true that the contracts and their guidelines refer to "recommended" prices. However, the guidelines for shops clearly prevented the dealer from announcing either within or outside the shop a price other than the one established in the price

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<sup>100</sup> Yamaha's reply to the Statement of Objections, p.21-22.

<sup>101</sup> Judgment of the Court in Case 19/77 *Miller International v. Commission* [1978] ECR 131 paragraph 15.

<sup>102</sup> See Judgments in *Ferriere*, *Volkswagen* or *Accinauto*, cited above; Commission notice "Guidelines on vertical restraints", OJ C 291, 13.10.2000, p. 1, paragraph 7.

list. Even if discounts may have been possible, it is clear that the dealer was severely restricted in its freedom to communicate to the customer the price it fixed, and that such discounts, if the dealer was still willing to offer them, could not be communicated in a way contrary to the guidelines.

126. Besides, even if the circular letter does not totally rule out discounts, it strictly prevents any discount above 15%. This also constitutes a restriction of the dealer's ability to determine its sale prices. This practice has the object of fixing the maximum level of discount and, as a consequence, the minimum level of resale prices, thereby restricting or distorting price competition. The Commission has recognised that resale price maintenance can also be achieved through indirect means, such as fixing the maximum level of discount the distributor can grant from a prescribed price level<sup>103</sup>. If Yamaha prohibits rebates of more than 15%, then in reality there is an obligation to respect a minimum price: the recommended prices minus 15%.
127. A practice concerning resale prices, between Yamaha Music Nederland and its distributors, influences these distributors in the course of their business conduct. The prices charged by the dealers would otherwise have been different, irrespective of the exact degree to which the agreement was implemented. This is a restriction by object.
128. In its reply, Yamaha submits that the circular letter was sent by two employees who did not have the authority to do so. The letter was not signed or approved by Mr. Veenstra, who is the General Manager of Yamaha Music Nederland. It was an isolated incident involving only two models of a mixing desk and 14 dealers and thus cannot be relied on to establish that Yamaha had a policy of imposing resale prices on its Dutch dealers, thereby appreciably affecting trade between Member States<sup>104</sup>.
129. Such arguments are not acceptable. Firstly, Yamaha is responsible for the conduct of its employees. The Court of Justice has established that when an undertaking has been guilty of an infringement, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorised to act on behalf of the undertaking suffices<sup>105</sup>. In any event, Yamaha has in fact acknowledged in its reply (paragraph 302 and 310) that the letter constituted an infringement. Secondly, a provision restricting the dealers' ability to determine their resale prices, even concerning 14 dealers, necessarily had potential effects on competition. Furthermore, such a letter has to be assessed in a context where the dealers' ability to communicate their prices was already severely limited.

#### (ii) Duration of the restriction

130. The relevant contracts were signed in September 1988 and were in force until September 2000/February 2001. Furthermore, Yamaha Music Nederland sent a

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<sup>103</sup> Commission notice "Guidelines on vertical restraints", paragraph 47

<sup>104</sup> Yamaha's reply to the Statement of objections, p. 29-32

<sup>105</sup> Judgment of the Court in Joined cases C-100-103/80 *SA Musique Diffusion française v Commission of the European Communities* [1983] ECR 1825, paragraph 97; Judgment of the Court of First Instance in Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission*, [2002] II-1487, paragraph 275.

circular letter dated February 1996 to YPAC dealers stating that advertisements and promotion actions with more than 15% rebates are not considered as normal by Yamaha.

131. In its reply, Yamaha stated that the date on the letter had a typographical error and that the letter was actually sent in February 1997, which is supported by the fact that the letter refers to prices in April 1997.

132. The restriction can be proved from September 1988 to February 2001.

(b) *Resale price maintenance in Italy*

(i) Restrictive object

133. Some clauses directly restrict the dealer's ability to freely set its sales prices: the 1997 contract for pianos prohibits the dealers "to publish or to announce in whichever form prices different from those indicated in the official price lists" and the 1997 agreement for professional audio states that "the commercial terms are only valid under respect of the prices indicated in the list". These clauses have not been commented upon by Yamaha in its written reply. Another provision, repeatedly used in agreements, price lists or conditions of sales, prohibits the dealers "to reproduce advertising material and price lists different from the original". This provision discourages the dealers from advertising prices other than those listed by Yamaha.

134. As the distribution agreement and the terms of business prohibit dealers from publishing prices different from those indicated by Yamaha Musica Italia s.p.a., the dealers' freedom to set prices is strictly limited (recitals 72-78). Dealers cannot attract clients by advertising prices that differ from the "published prices" of Yamaha Musica Italia, nor by indicating prices in their shops different from those indicated by Yamaha Musica Italia s.p.a..

135. These agreements have the object of influencing resale prices, thereby restricting or distorting price competition, irrespective of the exact degree to which they were implemented.

136. Furthermore, the annex to the contract between Yamaha Musica Italia and [ ... ], dated 18 July 2000 states that "prices for the public will be determined directly with Yamaha Musica Italia"(recital 79).

137. Obliging a purchaser to resell at a particular price is an obvious restriction of competition that is expressly prohibited by Article 81(1) of the Treaty 106 and 53(1) of the EEA Agreement.

138. In its reply to the Statement of Objections<sup>107</sup>, Yamaha states that the empirical study of Italian retail price levels and discounting prepared by Frontier Economics supports

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<sup>106</sup> Commission Decision of 5 October 1973 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.010 Deutsche Philips GmbH), OJ L 293, 20.10.1973, p.40; Commission Decision of 11 December 1980 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.912 Hennessy-Henkell), OJ L383, 31.12.1980, p.11; Judgment of the Court in Case 161/84 *Pronuptia*, [1986] ECR 353 point 25.

<sup>107</sup> Yamaha's reply to the Statement of Objections, p. 25-29.

the view that Italian dealers were not restricted as regards their retail prices or discount policies.

139. Yamaha also submits that with the possible exception of a letter to one dealer, sent by an employee who did not have the authority to send such a letter, there is no evidence that Yamaha Musica Italia imposed any restrictions on Italian retailers as to pricing. Yamaha submits that the conclusions in the Statement of Objections concerning the meaning of Article 5(10) of the Agreement are contradicted by Article 5(12) of the same agreement which states that: “Authorised dealers can freely establish their own prices applied to end-customers”. Article 5(10) provides that: “The authorised buyer undertakes not to reproduce advertising material and price lists different from the original, without approval of Yamaha Musica Italia. For infringements of this clause Yamaha Musica Italia reserves itself the right to take any action to protect its own interests”. This provision, which appears in other documents as well, was intended to prevent dealers from using official Yamaha Musica Italia listed prices, official listing images and logos in an inappropriate or misleading manner. These clauses, in any event, were not enforced, as can be seen from examples of Yamaha dealers advertising with prices below Yamaha’s recommended prices.
140. As regards the document sent to [ ... ], Yamaha does not contest its restrictive object, but claims that it was not a contract but a letter sent by an employee who did not have the authority to send such a letter. [ ... ] would not have considered itself bound by any obligation concerning its prices, and actually advertised prices of Yamaha products that were below those contained in Yamaha Musica Italia’s official price listing.
141. The Commission considers that Yamaha’s arguments are not convincing. Yamaha’s provisions clearly discouraged the dealer from using prices and discounts different from those published by Yamaha Musica Italia and tended to freeze prices around supposedly recommended prices. The provisions contained in the contracts are restrictions by object and it is not necessary to show that they actually produced any restrictive effect. The fact that Yamaha Musica Italia sent a circular letter in January 2001 to all Italian dealers declaring the clause according to which “they should not reproduce advertising material and price lists different from the original” null and void can be considered as further evidence that Yamaha itself considered this clause as a restriction of competition or at least that dealers might interpret it as such. Sporadic examples of Yamaha dealers advertising below Yamaha’s recommended prices do not mean that the restrictive clauses did not have any effect. The fact that a clause restricting directly or indirectly the dealer’s freedom to fix resale prices, which by its very nature constitutes a restriction of competition, may not have been implemented does not prove it had no effect, because as stated in *Miller* it may create a “visual and psychological”<sup>108</sup> effect. Furthermore, the assessment under article 81(1) must also take account of the agreement’s potential anti-competitive effects, and not only of actual effects<sup>109</sup>. In Italy, the potential anti-competitive effects may have been important considering the strong market position of Yamaha for several products such as digital pianos. Indeed, the stronger the market position of the

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<sup>108</sup> See Judgment of the Court in Case 19/77 *Miller International Schallplatten GmbH v Commission of the European Communities* [1978] ECR 131.

<sup>109</sup> Judgment of the Court in Case C-7/95 *John Deere Ltd v Commission of the European Communities* [1998] 3111.

supplier, the higher the risk that a supposedly recommended resale price –which was, in Yamaha’s case, accompanied by provisions to strongly limit the freedom of the dealer to diverge from this price- will lead to a more or less uniform application of that price level by the dealers, because they may use it as a focal point<sup>110</sup>.

142. As regards the document sent to [ ... ], it is obvious from its title and content that it constitutes an annex to the contract. First, it is designed to be signed by both parties. Secondly, while Yamaha referred to this document in its reply to the Statement of Objections as a “letter”, the company, in a previous reply to a Commission request for information, had defined this document as the “distribution agreement with [ ... ]<sup>111</sup>”. It is clear from its wording that its object is to fix resale prices. The argument according to which it was sent by an employee who did not have the authority to do so cannot be accepted, as explained in recital 129, Yamaha is responsible for the conduct of its employees<sup>112</sup> and the document is written in the official Yamaha format. This incident is a demonstration that Yamaha wanted to have some control of resale prices. Besides, in its written reply (paragraph 301), Yamaha actually acknowledged the restrictive object of this clause.

(ii) Duration of the restriction

143. The distribution contracts with the restrictive clauses run from March 1992<sup>113</sup>. The restrictions ended on 9 January 2001, when Yamaha Musica Italia Spa sent its distributors a letter stating that dealers were free to determine their resale prices and that clause 15 was no longer valid<sup>114</sup>, thus clearly conveying the idea that such type of clauses (including those that may have been included in other documents) were no longer enforceable. Consequently, this restriction can be proved from 31 March 1992 to 9 January 2001.

(c) *Resale price maintenance in Austria*

(i) Restrictive object

144. The distribution contract for oboes and bassoons stated that the sale price to other dealers will be calculated as follows: Your purchasing price x 1,0877= net purchasing price distributor (recitals 81-82). This clause has the object of directly fixing resale prices when selling to other dealers and of artificially harmonising selling prices and discounts between territories, thereby restricting or distorting price competition.
145. In its reply to the Statement of Objections, Yamaha states that the price calculation formula was addressed to only three Austrian dealers who had no experience in pricing at the wholesale level. These provisions were intended as recommendations and were in fact never applied. As a result, the calculation method did not appreciably affect trade between Member States<sup>115</sup>.

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<sup>110</sup> Commission notice “Guidelines on vertical restraints” paragraph 226-228.

<sup>111</sup> Annex to Yamaha’s reply, 4 December 2000, p. 856.

<sup>112</sup> See footnote 105.

<sup>113</sup> For instance, the contract between Yamaha Musica Italia s.p.a. and [ ... ] was signed on 31 March 1992

<sup>114</sup> See Y 12233, p.13681.

<sup>115</sup> Yamaha’s reply to the Statement of Objections, p.32-33.

146. It is, however, clear from the wording of the contract that the price calculation formula was not intended as a recommendation, but had the object of directly fixing resale prices. Yamaha has not submitted any evidence that the clause was never applied. Furthermore, Yamaha found it necessary to send a letter on 1 February 2001 explaining that the clause was not binding. This is a restriction by object, irrespective of the exact degree to which it has been applied.

(ii) Duration of the restriction

147. The contract in the Commission's possession was signed on 1 December 1999. A circular letter signed by Yamaha Europa GmbH, Germany, was sent on 1 February 2001 explaining that the clause was not binding. Consequently, the restriction can be proved from 1 December 1999 to 1 February 2001.

2.1.2. *Appreciable restriction of competition*

148. The Court of Justice has established that "in prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition, Article 81(1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect"<sup>116</sup>.
149. It is apparent that several of Yamaha's European subsidiaries have prevented or restricted their official distributors from selling to customers and /or distributors located in other Member States, thereby including active and passive sales to end-users and to authorised resellers. They have also obliged some official distributors to purchase exclusively from the Yamaha national subsidiary and/or to sell only to final customers. They have also in various forms fixed resale prices or severely limited the dealers freedom to determine resale prices. All these restrictions are considered as hardcore restrictions.
150. Territorial protection shelters distributors from competition and deprives consumers of the benefits of an integrated market. It artificially reinforces different price levels between Member States.
151. Provisions restricting the freedom of dealers to fix prices have deprived retailers of an important means of competition. Price competition holds prices to the lowest possible level and encourages trade in goods between Member States, thereby making possible an optimal allocation of resources based on the adaptability of retailers and giving benefit to consumers.
152. Yamaha holds an average market share of [between 10 and 20%] in the Community. For several product markets, its European market share is much higher (between 30-40% for portable keyboards, 20-30% for woodwind instruments, 20-30% for pianos, etc.). Since the geographic market has been defined as national, it is also relevant to mention the very high market shares for many products in several countries: for example, for digital pianos, Yamaha's market share is 30-40% in Italy, 50-60% in France, for electronic organs it is 30-40% in Italy and 70-80% in France, for portable keyboards it is 20-30% in Italy, 30-40% in Denmark, 30-40% in France and 40-

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<sup>116</sup> See judgment in *Miller*, cited above.



50% in The Netherlands. It is less for other products (less than 10% in Europe for electronic guitars and for pro audio equipment)<sup>117</sup>.

153. Even in the case of low market shares, the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) <sup>118</sup> of 2001 would not apply due to the hardcore nature of the restrictions<sup>119</sup>. The same is true of the preceding de minimis Notice of 1997<sup>120</sup>.
154. Due to Yamaha's important position on the affected markets, the fact that most of the restrictions at issue applied to an important number of dealers on such markets, and the very nature of the restrictions, involving territorial protection and price fixing, the prevention, distortion and/or restriction of competition is appreciable.
155. In its reply to the Statement of Objections, Yamaha submitted that the challenged provisions did not have the effect of restricting competition. During the Hearing, Yamaha also reproached the Commission for not having analysed the actual effects of the alleged restrictions.
156. The Commission considers that **most of the alleged restrictions are restrictions by object**. It is settled case-law that there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. The question whether these agreements had anti-competitive effects may therefore only be of relevance for the assessment of the fine. Even if some of the restrictions could be considered as restrictive of competition by effect, it is enough to show the potential effect on competition.

### 2.1.3. *Effect on trade between Member States and between EEA Contracting Parties*

157. In order that an agreement or a concerted practice may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective criteria of law and fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States <sup>121</sup>.
158. In that regard it is necessary to consider, in particular, whether the measures in question are capable of bringing about a partitioning of the market in certain products between Member States, and thus rendering more difficult the interpenetration of trade which the Treaty intended to create<sup>122</sup>.

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<sup>117</sup> See table on Yamaha's market shares, provided by Yamaha.

<sup>118</sup> OJ C368, 22.12.2001, p.13.

<sup>119</sup> Paragraph 11.

<sup>120</sup> OJ C372, 9.12.1997, p.13.

<sup>121</sup> Judgment of the Court in Case 215/96 *Carlo Bagnasco and others / Banca Popolare di Novara soc. Coop. arl.* [1999] ECR I-135, paragraph 47.

<sup>122</sup> Judgment of the Court in Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, [1966] ECR 235; Judgment of the Court of First Instance in Case T-77/92 *Parker Pen v Commission*, [1994] ECR p.II-549, paragraph 39.

159. It is apparent that some Yamaha official dealers have been prevented from purchasing musical instruments in other Member States and from directly or indirectly exporting to other Member States. It is also apparent that Yamaha has severely restricted the dealers' freedom to fix prices for certain Member States.
160. The agreements concern eight national markets within the EEA (Germany, Italy, France, Austria, Belgium, The Netherlands, Denmark and Iceland).
161. The provisions in the agreements, designed to prevent a dealer from exporting goods, are liable to partition the markets and consequently to affect trade between Member States<sup>123</sup>. The same reasoning applies to measures that restrict parallel imports. Resale price maintenance may also have direct effects on trade between Member States by increasing imports from other Member States and by decreasing exports from the Member States where resale price maintenance has been implemented. Trade flows between Member States would have been different without the restrictions contained in the Yamaha agreements.
162. Such agreements are by their very nature capable of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty intended to bring about. On account of Yamaha's position in affected markets and by the very nature of the restrictions involving territorial market protection and price restrictions, the potential effects on trade between Member States are appreciable.
163. Yamaha has submitted that the agreements concerned a limited number of dealers, products, or geographic regions and thus had only very limited and isolated impact on trade between Member States. The ban on cross-dealer supplies was included only in agreements with dealers in France, Germany and Italy. The provision objected to in the contract relating to Iceland applied to a small country and any effect in the EEA would be at worst de minimis. The alleged territorial restrictions concerning guarantee were limited to Belgium, Germany and Denmark. The scope of resale price maintenance was limited to isolated instances in terms of dealers, the products involved and/or the geographic scope<sup>124</sup>.
164. The Commission considers, however, that on the basis of the importance of Yamaha's position on the market, and given the fact that the agreements concern eight countries and contain hardcore restrictions, these provisions were highly capable of affecting trade between Member States and between EEA Contracting Parties. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement therefore apply.

## 2.2. Article 81(3) of the Treaty

### 2.2.1. Commission Regulations (EEC) No 1983/83, 1984/83 and (EC) No 2790/99

165. The block exemption in Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive

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<sup>123</sup> Judgment of the Court of 31 March 1993, *Woodpulp*, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, ECR 1993 p. I-1307, paragraph 176; or Judgment in *Miller*, cited above.

<sup>124</sup> Yamaha's reply to the Statement of Objections, p.59-61.

distribution agreements<sup>125</sup>, in force when the agreements or concerted practices were concluded and/or implemented, does not apply because it only covers exclusive distribution, not selective distribution, which is, apart from Iceland, the system chosen by Yamaha in Europe for the majority of its products.

166. With regard to Iceland<sup>126</sup>, the prohibition on passive sales, the fact that Yamaha will prevent persons other than its sole distributor [ ... ] from selling Yamaha products and the obligation imposed on [ ... ] not to resell the products to third parties which it knows will resell or re-export the products outside Iceland, are considered as restrictions of competition. These restrictions render inapplicable the block exemption provided for in Article 1 of Regulation (EEC) No 1983/83.
167. The block exemption in Commission Regulation (EEC) N° 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements<sup>127</sup> in force when the agreements or concerted practices were concluded and/or implemented does not apply to the exclusive purchase provisions imposed on Yamaha dealers in Italy and France (recitals 27-28), which contain further restrictions – notably the obligation only to sell to final customers – not permitted under Article 2(2) of Regulation (EEC) No 1984/83.
168. Regulations (EEC) No 1983/83 and (EEC) No 1984/83 ceased to apply on 31 December 1999. The block exemption in Commission Regulation (EC) No 2790/99 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices<sup>128</sup>, which applies from 1 June 2000 does not apply. For several markets, Yamaha's market share considerably exceeds 30%<sup>129</sup> which, according to Article 3 of Regulation (EC) No 2790/99, rules out the application of the exemption.
169. Even if markets for musical instruments in the EEA where Yamaha's share of total sales is below 30% is taken as the relevant market, Regulation (EC) No 2790/99 would not apply to Yamaha's agreements, having regard to Article 4(a), (b) and (d) of that Regulation.
170. The obligation in the Austrian, Belgian, Dutch and French contracts, requiring official distributors to only supply dealers authorised by the national subsidiary of Yamaha amounts to a prohibition of cross supplies between authorised dealers in Yamaha's selective distribution network. The restriction of cross supplies between appointed distributors within a selective distribution system constitutes a hardcore restriction of the type referred to in Article 4(d) of Regulation (EEC) No 2790/1999. The block exemption in that Regulation therefore does not apply.
171. The obligation in Article 11 of the Austrian, Belgian and German contracts, requiring official distributors to contact Yamaha before exporting via the Internet constitutes a

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<sup>125</sup> OJ L173, 30.06.1983 p.1.

<sup>126</sup> Commission Regulation (EEC) N° 1983/83 was incorporated in the EEA Agreement in Annex XIV, paragraph B.

<sup>127</sup> OJ L173, 30.06.1983, p. 5.

<sup>128</sup> Commission Regulation (EC) N° 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L336, 29/12/1999 p.0021-0025.

<sup>129</sup> See Table 1.

hardcore restriction of the type referred to in Article 4(b) of Regulation (EEC) No 2790/1999. The block exemption in that Regulation therefore does not apply.

172. The clauses imposing territorial restrictions on the validity of the the manufacturer's guarantee in Denmark, Germany and Belgium constitute hardcore restrictions of the type referred to in Article 4(b) of Regulation (EEC) No 2790/1999. They are agreements or concerted practices that have as their direct or indirect object the restriction of the territory into which or the customers to whom the buyer may sell the contract goods or service. The exemption in Regulation (EEC) No 2790/1999 therefore does not apply.
173. The prohibition of passive sales outside the territory contained in the contract with the exclusive distributor in Iceland restricts parallel trade and constitutes a hardcore restriction of the type referred to in Article 4(b) of Regulation (EEC) No 2790/1999. The exemption in that Regulation therefore does not apply.
174. The obligations imposed on dealers in The Netherlands, Italy and Austria as regards pricing, amount to resale price maintenance. Agreements or concerted practices having as their direct or indirect object the restriction of the buyer's ability to determine its sale price, by establishing a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are hardcore restrictions of the type referred to in Article 4(a) of Regulation (EEC) No 2790/1999. The exemption in that Regulation therefore does not apply.

2.2.2. *Individual exemption under Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement*

175. The Agreements in question were not notified. If such agreements had been notified, they could not have been exempted individually from the application of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, since the conditions necessary for granting an exemption are not met due to the nature of the restrictions of competition. Territorial protection and resale price maintenance are hardcore restrictions that do not meet the cumulative conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement. They do not contribute to improving the production or, in this case, the distribution of goods, nor are consumers allowed a share of the resulting benefit.
176. In its reply, Yamaha submits that its agreements would qualify for exemption under Article 81(3), notably because Yamaha's agreement contributed to improving distribution and because Yamaha's agreements provided benefits that were passed on to consumers. Until recently, Yamaha's distribution system in Europe was locally organised and not coordinated, each Yamaha subsidiary had autonomy concerning the structuring of its distribution arrangements. In particular, Yamaha's agreements were designed to ensure that Yamaha retailers operated at their appropriate level in the distribution chain and did not distort competition by functioning at the wholesale or supplier level. In a letter sent on 16 December 2002, after the written reply and the Hearing, Yamaha further explained that a distortion of the distribution chain would have occurred if cross-dealer supplies had been allowed because Yamaha used quantity discounts<sup>130</sup> to encourage retailers to develop end user sales. If dealers could have increased their sales volumes by supplying other dealers, the quantity

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<sup>130</sup> Additional arguments sent by Yamaha to the Commission in a letter dated 16 December 2002.

discount system would no longer have achieved its desired effects: the wholeselling dealer would have benefited from the quantity discount without increasing end user demand for Yamaha instruments and the retailer who purchased from the wholesaler would no longer have had the incentives to develop end user demand since any economic benefit it received on purchases from the wholesaler would not have been conditional on the level of its sales of Yamaha products. Besides, these advantages were passed on to consumers in the form of efficient promotion and servicing of its products. Yamaha further submits that “the limitations on trade between dealers in different territories” were indispensable to protect the integrity of its distribution arrangements and to incentivise dealers to make investments in sales and promotion<sup>131</sup>.

177. The Commission considers that Yamaha’s provisions and, in particular, the ban on cross-dealer supplies, **did not contribute** to improving distribution. Retailers must be free to engage in cross-dealer supplies and it is difficult to see any distortion of the distribution chain if a retailer decided to buy from or to supply other retailers. As regards the quantity discounts, Yamaha’s arguments cannot be accepted. What matters for Yamaha Corporation Japan is to sell the maximum number of product items, irrespective of the destination of the sales of a retailer and identity of the buyer (another retailer or final customer). A dealer buys from another dealer in order to sell the product(s) to a final customer. Furthermore, if a dealer decides to buy products from another dealer, and this without receiving a quantity discount from Yamaha, it is because he still has an interest to do so due to trade price differentials between dealers. Besides, **there is absolutely no evidence that the quantity discounts granted by Yamaha have the effect of increasing end user demand** for Yamaha products as a result of lower sales prices to users, because the retailer can also raise its margin and does not necessarily pass on the benefit to the consumers. There is also no evidence that cross supplies between dealers would diminish the interest of a dealer receiving such discounts in promoting the sale of Yamaha’s products to consumers in its territory. Even assuming that Yamaha wanted to penetrate a market via quantity discounts and promote the effort by each dealer to sell more to end users in a specific territory, it could have done so by less restrictive means than a ban on cross-dealer supplies, for instance by imposing sales targets.
178. Furthermore, **consumers did not get any benefit from Yamaha’s policy**. Territorial protections and resale price maintenance prevent consumers from taking advantage of the Single Market and from benefiting from the price differences between Member States. Similarly, guarantees limited to the country of origin of purchase are evidently not beneficial to the consumer.
179. The “limitations on trade between dealers in different territories”, that Yamaha here clearly acknowledges, are, in any event, in no way indispensable to protect the integrity of its distribution arrangements.

### **2.3. Addressees of the Decision**

180. This Decision is addressed to:
- YAMAHA Corporation Japan

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<sup>131</sup> Yamaha’s reply to the Statement of Objections, p.34-36.

- YAMAHA Europa GmbH,
- YAMAHA Musica Italia s.p.a.
- YAMAHA Musique France S.A.
- YAMAHA Scandinavia AB

181. In its reply to the Statement of Objections, Yamaha submits that Yamaha Corporation Japan should not be an addressee of the Decision and that its turnover should be excluded from the calculation of the basic amount of any fine. The agreements employed in the various European Yamaha subsidiaries differed substantially in form and content and there was little, or no, uniformity in Yamaha's European distribution arrangements. This lack of uniformity in itself provides clear evidence of the autonomy of the European Yamaha subsidiaries and the absence of any involvement on the part of Yamaha Corporation Japan in the alleged infringements. From 1966 on, Yamaha Corporation Japan have supplied Yamaha products to the European subsidiaries. As explained to the Commission in the reply dated 14 January 2002, throughout this period the role of Yamaha Corporation Japan in Europe has been limited to (i) determination of the prices charged and the currency used for these supplies; (ii) decisions concerning the distribution of non-Yamaha products and the use of the Yamaha brand on third-party products; and (iii) decisions concerning the corporate organisation of the European Yamaha subsidiaries. Yamaha Corporation Japan did not participated in the preparation or implementation of the various distribution agreements or commercial policies concerned by this procedure. These activities were carried out by the European subsidiaries which planned and implemented their commercial policies independently of Yamaha Corporation Japan<sup>132</sup>.
182. The Commission notes that the European subsidiaries of Yamaha are 100% owned by Yamaha Corporation Japan either directly by Yamaha Corporation Japan or through Yamaha Europa GmbH, which is a 100% subsidiary of Yamaha Corporation Japan. The Commission presumes that the infringements committed by the subsidiaries are attributable to the parent company. A wholly-owned subsidiary necessarily follows a policy laid down by the parent company<sup>133</sup>.
183. A further indication of the involvement of Yamaha Corporation Japan is the heavy representation of the parent company on the Board of Directors of its European subsidiaries. Yamaha Corporation Japan appoints all members of the Boards of Directors of its subsidiaries. The Boards of the European subsidiaries are composed of 3 to 6 persons. Each Board is composed of one Director from Yamaha Corporation Japan (except Yamaha Scandinavia AB), and 2 or 3 Directors of the Yamaha European subsidiaries who were formerly employed by Yamaha Corporation Japan.
184. Besides, in the case of Yamaha Musica Italia s.p.a., the existence of an internal agreement between Yamaha Corporation Japan and Yamaha Musica Italia constitutes

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<sup>132</sup> Yamaha's reply, p. 6-7.

<sup>133</sup> See Judgment of the Court of 25 October 1983, *AEG-Telefunken v Commission*, Case 107/82, ECR 1983 p.3151, paragraph 50. See also Judgment of the Court of 16 November 2000, *Stora Kopparbergs Bergslags v Commission*, Case C-286/98, ECR 2000 p.9925, paragraph 29.

clear evidence of the involvement of the former in the distribution policy of its Italian subsidiary. Yamaha Corporation Japan gives indeed clear instructions to its Italian subsidiary on its distribution policy. This internal agreement<sup>134</sup> states: “Article 5: 1. The company (Yamaha Corporation Japan) shall refer to the distributor (Yamaha Musica Italia) all enquiries and orders received from within Territory in connection with products. 2. Distributor shall refer to company all enquiries and orders received from outside Territory with products. 3. Distributor shall not solicit enquiries or orders outside Territory in connection with Products.” This document shows the involvement of Yamaha Corporation Japan in the distribution agreements and/or commercial policies of at least Yamaha Musica Italia. A letter was sent to Yamaha before the oral hearing in order to invite comments on this agreement. Yamaha explained that the content of this agreement merely “reflects the different responsibilities of Yamaha Corporation Japan and Yamaha Musica Italia as concerns the supply of Yamaha products”. Such an explanation cannot be accepted: even if Yamaha Corporation Japan is responsible for the supply of the products, it is difficult to see why it prohibits the distributor from soliciting enquiries or orders outside territories. Consequently, this agreement constitutes a further evidence of the involvement of Yamaha Corporation Japan in the distribution and commercial policies of its European subsidiaries, in addition to the extent of the shareholding.

## **2.4. Article 15(2) of Regulation No 17**

### *2.4.1. Imposition of a fine*

185. Article 15(2) of Regulation N°17 provides that the Commission may by decision impose on undertakings or associations of undertakings fines from 1000 to 1000000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 81(1) of the Treaty. In fixing the amount of the fine, the Commission looks at the gravity and the duration of the infringement. The Commission also takes account of the existence of any aggravating and/or mitigating circumstances.
186. The Commission considers that Yamaha’s measures aimed at restricting exports and fixing resale prices constitute a single infringement consisting of several elements (obligations on official distributors to sell only to final customers, obligations on official distributors to purchase exclusively from the Yamaha national subsidiary, obligations on official distributors to supply solely distributors authorised by the national subsidiary of Yamaha, obligations on official distributors to contact Yamaha before exporting via the internet, territorial protection concerning the manufacturer’s guarantees, restrictions of parallel trade in Iceland, restrictions concerning resale prices) which sometimes had a cumulative effect. The agreements and/or concerted practices, by restricting sales outside the territories and limiting the dealer’s ability to determine its resale prices, were complementary and pursued the same object of artificially maintaining different price levels in different countries. The territorial and price restrictions had the common denominator of ensuring different price levels within the Community. The two types of restrictions were sometimes contained in

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<sup>134</sup> Exclusive distributorship agreement between Yamaha Corporation Japan and Yamaha Musica Italia spa, June 1990. File, p. 2791.



the same distribution contracts<sup>135</sup>. The restrictions were applied in several countries and the contractual provisions were sometimes identical. Thus, the combination of the restrictions implemented by Yamaha concerns a large number of its distributors in the Community, which have been restricted from exporting or importing Yamaha's products within the Community and sometimes also restricted in their ability to determine resale prices. The relevant contractual provisions therefore had the common object and sometimes also the effect of partitioning the national markets, contributing to ensuring different price levels in different countries, through a variety of complementary restrictions of competition, affecting the proper functioning of the single market.

187. The infringement was committed intentionally. The clauses restricting competition were mainly contained in the contracts between Yamaha's European subsidiaries and their authorised dealers, or in their correspondence, and had as the common denominator the partitioning of national markets or restrictions concerning prices. Yamaha could not have been unaware of the inclusion of territorial restrictions or price fixing provisions in its agreements or correspondence, and of the anti-competitive object of these provisions.

#### 2.4.2. *Amount of the fine*

##### 2.4.2.1. Gravity of the infringement

188. In fixing the amount of the fine under Article 15(2) of Regulation No 17, the Commission has to take account of all relevant circumstances, and in particular the gravity and the duration of the infringement.
189. In determining the gravity of the infringement, the Commission takes account of the nature of the infringement, its actual effects on the market, in so far these can be measured, and the size of the relevant geographic market.
190. Agreements and/or restrictive practices partitioning the national markets and fixing resale prices are, according to an extensive body of precedent of case law, contrary to the objectives of the Community. Resale price maintenance represents a drastic interference in competition, with the result that, by its nature, it constitutes, in principle, a very serious infringement of the competition rules. As regards the territorial restrictions and, in particular, the ban on cross dealer supplies which constitutes the core of these restrictions, it is proposed to qualify them, in this case, as serious. This kind of restriction has been considered as an infringement in *Hasselblad*<sup>136</sup> and in several cases reported in the Fifteenth Report on Competition Policy (1985)<sup>137</sup>. However, it is only since the entry into force of Commission Regulation (EC) No 2790/99 and the Guidelines that the Commission has clearly defined the ban on cross dealer supplies as a hardcore restriction, conveying a clear signal to undertakings. In the specific circumstances of the case, the territorial restrictions, mainly composed of bans on cross dealer supplies, occurred mostly

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<sup>135</sup> File, p. 3012. Contratto di Distribuzione selettiva per i pianoforti verticali – Distribuiti dalla Yamaha Musica Italia s.p.a. & [ ... ], 31.03.92, Art. 4 and 10.

<sup>136</sup> Cited above

<sup>137</sup> *Rodenstock/Metzler*, point 64 and 65; *Mitsui/Bridgestone*, *ibid*, point 60; and also *Interlühke*, *ibid*, at point 61 where both a positive obligation to sell only to end-users and a prohibition on cross-supplies to other dealers were held to fall within Article 85(1)



before the entry into force of Regulation No 2790/99, and are therefore considered as serious.

191. Some of the contractual provisions objected to in the Decision were contained in a limited number of agreements, were sometimes applied to only a limited number of dealers and products and were not systematically included in all Yamaha agreements throughout the EEA. Besides, the bans on cross dealer supplies still allowed sales to end-users outside the territory, as evidenced by Yamaha. The provisions requiring Yamaha's dealers to sell exclusively to end users were included in agreements with dealers in France, Germany and Italy. The obligation on Yamaha dealers to buy solely from the national subsidiary were included in agreements with dealers in France and Italy. In Germany, these last two restrictions concerned all products. Concerning France, the Commission has evidence of these two restrictions only for pianos and disklaviers, and concerning Italy only for pianos. The Euro distribution agreements, signed in 2000 and applied in Germany, Austria, Belgium and the Netherlands, which contained an obligation to supply only dealers that had been authorised by the national subsidiary and an obligation to contact Yamaha before exporting via the internet, covered all products. As regards the guarantees only valid in the country of origin, it concerned all products in Denmark. In Germany, the Commission has only evidence of such a restrictive provision for clavinovas, and in Belgium only for electronic equipment. The restrictions on parallel trade in Iceland concerned all products but applied to a small and remote market. As regards resale price maintenance, the "Guidelines for shops" in The Netherlands concerned all products, but the circular letter excluding rebates above 15% only concerned pro-audio products. In Italy, the restrictive provisions concerned a large number of products. In Austria, resale price maintenance applied to only three dealers and only to oboes and bassoons.
192. Some of the provisions appear not to have been implemented in full, and the Commission has no evidence of substantial effects of the restrictions on the market.
193. With regard to the size of the market it must be recalled that, as far as the geographical scope of these different elements of the infringement is concerned, the agreements containing restrictive clauses concerned eight national markets: Germany, Italy, France, Austria, Belgium, The Netherlands, Denmark and Iceland. The measures involved, because of their nature, may also have affected dealers and end-consumers located in other Member States. However, some elements of the infringement applied to a limited number of dealers in such markets or only to some products and may, consequently, have had a limited effect in terms of value of the goods concerned.
194. Consequently, in the light of these considerations, the infringement committed by the addressees is serious. In the light of the seriousness of the infringement, EUR 2 million is an appropriate amount to take as a basis for calculating the fine.

#### 2.4.2.2. Duration of the infringement

195. Overall, the different elements of the infringement have been in force between 1977 to 2002, as follows:

- obligations on official dealers to sell only to final customers from June 1977 to March 2000 in Germany, from March 1992 to October 1996 in Italy, and from March 1989 to December 1996 in France;
  - obligations on official dealers to purchase exclusively from the Yamaha national subsidiary from March 1989 to December 1996 in France, and from March 1992 to October 1996 in Italy;
  - obligations on official dealers to supply solely dealers authorised by the national subsidiary of Yamaha from February 1997 to March 2002 in France, from November 2000 to March 2002 in Austria and in Belgium, from October 2000 to March 2002 in The Netherlands;
  - obligations on official dealers to contact Yamaha before exporting via the internet from March 2000 to December 2000 in Austria and Belgium, and from April 2000 to January 2001 in Germany;
  - territorial protection concerning the manufacturers guarantees for one year in Germany and Belgium, and from April 1998 to January 2001 in Denmark;
  - restrictions of parallel trade in Iceland from September 1995 to January 2001;
  - resale price maintenance in The Netherlands from September 1988 to February 2001, in Italy from March 1992 to January 2001, and in Austria from December 1999 to February 2001.
196. As a result, the infringement was of long duration. However, all the elements have not been simultaneously implemented. It would therefore be appropriate to increase the basic amount by 60% (EUR 1.2 million) to an amount of EUR 3.2 million.

#### 2.4.2.3. Aggravating or mitigating circumstances

197. There are no aggravating circumstances.
198. Yamaha terminated a majority of the restrictions as soon as the Commission intervened. Yamaha received the letters sent by the Commission pursuant to Article 11 of Regulation No 17 in October 2000. Then, it conducted a detailed internal review of its distribution agreements and, between 27 December 2000 and 1 February 2001, sent letters to its dealers in Germany, France, Greece, Iceland, The Netherlands, Italy, Austria, United Kingdom, Belgium and Denmark either clarifying the meaning of certain contractual clauses or annulling them. At the same time, in consultation with the Commission staff, Yamaha continued its steps to redesign its entire European distribution system and has indeed recognised that some clauses were contrary to Article 81(1). The new distribution Agreements were notified to the Commission on 5 March 2002.
199. In view of this mitigating circumstance, the amount of the fine should be reduced by 20% (EUR 0.64 million), to an amount of EUR 2.56 million.

#### 2.4.2.4. Conclusion

200. In view of all these circumstances, the amount of the fine should be set at EUR 2.56 million.

HAS ADOPTED THIS DECISION:

*Article 1*

Yamaha Corporation Japan, Yamaha Europa GmbH, Yamaha Musica Italia s.p.a, Yamaha Musique France S.A. and Yamaha Scandinavia AB have infringed Article 81(1) of the Treaty by entering into agreements and/or concerted practices with authorised dealers, containing the following restrictions on competition within the common market, for the periods indicated:

- (a) obligations on official dealers to sell only to final customers :
  - (i) from June 1977 until March 2000 in Germany,
  - (ii) from March 1992 until October 1996 in Italy,
  - (iii) from March 1989 until December 1996 in France;
- (b) obligations on official dealers to purchase exclusively from the Yamaha national subsidiary :
  - (i) from March 1989 until December 1996 in France
  - (ii) from March 1992 until October 1996 in Italy;
- (c) obligations on official dealers to only supply dealers authorised by the national subsidiary of Yamaha :
  - (i) from February 1997 until March 2002 in France,
  - (ii) from November 2000 until March 2002 in Austria and in Belgium,
  - (iii) from October 2000 until March 2002 in The Netherlands;
- (d) obligations on official dealers to contact Yamaha before exporting via the internet :
  - (i) from March 2000 until December 2000 in Austria and Belgium,
  - (ii) from April 2000 until January 2001 in Germany;
- (e) territorial protection concerning the manufacturer's guarantees :
  - (i) for one year in Germany and Belgium,
  - (ii) from April 1998 to January 2001 in Denmark;
- (f) restrictions of parallel trade in Iceland from September 1995 to January 2001;

(g) resale price maintenance :

- (i) in The Netherlands from September 1988 until February 2001.
- (ii) in Italy from March 1992 until January 2001.
- (iii) in Austria from December 1999 until February 2001.

## *Article 2*

A fine of EUR 2.56 million is imposed on Yamaha Corporation Japan, Yamaha Europa GmbH, Yamaha Musica Italia s.p.a, Yamaha Musique France S.A. and Yamaha Scandinavia AB, which are jointly and severably liable for the fine, in respect of the infringement referred to in Article 1.

The fine shall be paid, within three months of the date of notification of this Decision, into bank account of the Commission of the European Communities:

*001-3953713-69 (IBAN BE 71 0013 9537 1369, SWIFT GEBABEBB)*

*FORTIS BANK*

*Rue Montagne du Parc 3*

*B-1000 Brussels*

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points , namely 5.60 %.

## *Article 3*

This Decision is addressed to:

- Yamaha Corporation  
10-1, Nakazawa-cho  
Hamamatsu 430-8650  
Japan
- Yamaha Europa GmbH  
Siemenstrasse 22-34  
D-25462 Rellingen
- Yamaha Musique France S.A.  
Rue Ambroise Croizat  
F-77183 Croissy-Beaubourg
- Yamaha Musica Italia S.p.A.  
Viale Italia 88  
I-20020 Lainate (Milano)
- Yamaha Scandinavia AB  
Box 300 53  
J A Wettergrens Gata 1

S-400 43 Göteborg

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, [...]

*For the Commission*

*Mario Monti*

*Member of the Commission*