one to whom the franchise is granted into another enterprise (see § 779.232), section 3(r) contains a specific exception for certain arrangements entered into by a retail or service establishment which is under independent ownership. The specific exception in section 3(r) reads as follows:

Provided, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

§ 779.227 Conditions which must be met for exception.

This exception, in accordance with its specific terms, will apply to exclude an establishment from enterprise coverage only if the following conditions are met:

(a) The establishment must be a ''retail or service establishment'' as this term is defined in section 13(a)(2) of the Act (see discussion of this term in §§ 779.312 and 779.313); and

(b) The retail or service establishment must not be an ''enterprise'' which is large enough to come within the scope of section 3(s) of the Act; and

(c) The retail or service establishment must be under independent ownership.

§ 779.228 Types of arrangements contemplated by exception.

If the retail or service establishment meets the requirements in paragraphs (a) through (c) of § 779.227, it may enter into the following arrangements without becoming a part of the larger enterprise, that is, without losing its status as a ''separate and distinct enterprise'' to which section 3(s) would not otherwise apply:

(a) Any arrangement, whether by agreement, franchise or otherwise, that it will sell, or sell only certain goods specified by a particular manufacturer, distributor, or advertiser.

(b) Any such arrangement that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area.

(c) Any such arrangement by which it will join with other similar retail or service establishments in the same industry for the purpose of collective purchasing. Where an agreement for ''collective purchasing'' is involved, further requirements are imposed, namely, that all of the other establishments joining in the agreement must be retail or service establishments under independent ownership, and that all of the establishments joining in the collective purchasing arrangement must be ''in the same industry.'' This has reference to such arrangements by a group of grocery stores, or by some other trade group in the retail industry.

(d) Any arrangement whereby the establishment's premises are leased from a person who also leases premises to other retail or service establishments. In connection with this rental arrangement, the Senate Report cites as an example the retail establishment which rents its premises from a shopping center operator (S. Rept. 145, 87th Cong., 1st Sess., p. 41). It is clear that this exception was not intended to apply to the usual leased department in an establishment, which is specifically included within the larger enterprise under the definition of section 3(r). (See discussion under § 779.225.)

§ 779.229 Other arrangements.

With respect to those arrangements specifically described in the proviso contained in the definition, an independently owned retail or service establishment will not be considered to be other than a separate and distinct enterprise, if other arrangements the establishment makes do not have the effect of bringing the establishment within a larger enterprise. Whether or not other arrangements have such an effect will necessarily depend upon all the facts. The Senate Report makes

the following observations with respect to this:

Thus the mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same ''enterprise.'' This is also the case in food retailing because of the great extent to which local independent food store operators have joined together in many phases of their business. While maintaining their stores as independently owned units, they have affiliated together not just for the purchasing of merchandise, but also for providing numerous other services such as (1) central warehousing; (2) advertising; (3) sales promotions; (4) managerial advice; (5) store engineering; (6) accounting systems; (7) site locations; and (8) hospitalization and life insurance protection. (S. Rept. 145, 87th Cong., 1st Sess., p. 42.)

The report continues with the following observations:

Whether such arrangements bring the establishment within the franchisor's, lessor's, or grantor's ''enterprise'' is a question to be determined on all the facts. The facts may show that the arrangements reserve the necessary right of control in the grantor or unify the operations among the separate ''franchised'' establishments so as to create an economic unity of related activities for a common business purpose. In that case, the ''franchised'' establishment will be considered a part of the same ''enterprise.'' For example, whether a franchise, lease, or other contractual arrangement between a distributor and a retail dealer has the effect of bringing the dealer's establishments within the enterprise of the distributor will depend upon the terms of the agreements and the related facts concerning the relationship between the parties.

There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, ''Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?''

For instance, a bona fide independent automobile dealer will not be considered a part of the enterprise of the automobile manufacturer or of the distributor. Likewise, the same result will also obtain with respect to the independent components of a shopping center.

In all of these cases if it is found on the basis of all the facts and circumstances that the arrangements are so restrictive as to products, prices, profits, or management as to deny the ''franchised'' establishment the essential prerogatives of the ordinary independent businessman, the establishment, the dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, right, or concession. (S. Rept. 145, 87th Cong., 1st Sess., p. 42.)

Thus, there may be a number of different types of arrangements established in such cases, and the determination as to whether the arrangements create a larger ''enterprise'' will necessarily depend on all the facts. Some arrangements which do not create a larger enterprise and some which do are discussed in §§ 779.230 through 779.235.

§ 779.230 Franchise and other arrangements.

(a) There are many different and complex arrangements by which businesses may join to perform their activities for a common purpose. A general discussion will be found in part 776 of this chapter. The quotation in § 779.229 from the Senate Report shows that Congress recognized that some franchise, lease, or other arrangements have the effect of creating a larger enterprise and whether they do or not depends on the facts. The facts may show that the arrangements are so restrictive as to deprive the individual establishment of those prerogatives which are the essential attributes of an independent business. (Compare *Wirtz* v. *Lunsford*, 404 F. 2d, 693 (C.A. 6).) An establishment through such arrangements may transfer sufficient ''control'' so that it becomes in effect a unit in a unified chain operation. In such cases the result of the arrangement will be to create a larger enterprise composed of the various segments, including the establishment which relinquishes its control.

(b) The term ''franchise'' is not susceptible of precise definition. The extent to which a businessman relinquishes the control of his business or the extent to which a franchise results in the performance of the activities through unified operation or common control depends upon the terms of the