EEC Competition Law: Tetra Pak Confirms the Disseverance of Block-Exemption Protection from Agreements Formed by Firms Acting in Abuse of Dominant Position

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EEC Competition Law: *Tetra Pak*
Confirms the Disseverance of Block-Exemption Protection from
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**Introduction**

**The setting is the Common Market. The protagonist is a gargantuan multinational firm, incorporated outside the European Community, that has just acquired another non-EC company. Among the target’s assets is an exclusive patent license covering a process that, although as yet inoperative, may increase the acquirer’s already formidable market share in Europe. A competitor — yet another non-EC actor — protests to the antitrust authorities, claiming abuse under the European equivalent of the Sherman Act. Our protagonist defends its exclusive license as a legal monopoly specially exempt from liability under the rules of competition. Who will win?**

This Note reports a chain of legal events presenting approximately this scenario, a story with implications for firms doing business in Europe well beyond the theme of patent protection.

In July 1988, the Commission of the European Communities held that Tetra Pak Raising SA ("Tetra Pak") had contravened EEC competition law by obtaining an exclusive patent license when it acquired a firm that held that license.² Tetra Pak contended that the licensing agreement was exempt from certain Community rules on account of a "block exemption" allowed for patent licenses.⁴ The Court of First Instance dismissed Tetra Pak’s application for an annulment of the Commission

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1. Under an exclusive patent license, the licensor generally agrees to grant no other licenses and to refrain from manufacture or sale within the licensee’s territory; the licensee acquires the right to sue infringers of the underlying patent. W. R. Corinish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 185 (2d ed. 1989).


3. Also known as a “group exemption,” a block exemption is a regulation promulgated by the EC Commission that removes an entire category of agreements from the confines of Article 85(1), the basic rule prohibiting restraints on competition. See infra notes 82-87 and accompanying text.

Decision in July of 1990 and nullified the exclusive license.\(^5\)

The Tetra Pak case addressed the legal interaction of the European Community's two fundamental rules of competition, Article 85 and Article 86 of the Treaty of Rome.\(^6\) Article 85(1) prohibits all agreements that prevent, restrict, or distort competition within the Common Market.\(^7\) Article 85(2) "automatically" voids any contract or license containing anticompetitive clauses.\(^8\) Article 85(3) empowers the Commission, however, to exempt entire categories of facially anticompetitive agreements if they enhance "the production or distribution of goods," promote "technical or economic progress," and benefit consumers.\(^9\) The second major provision dealing with competition, Article 86, prohibits any "abuse" by a firm occupying a dominant market position if such abuse affects trade among Member States.\(^10\)

In Tetra Pak, the subject matter of Article 86, namely, abuse of dominant position, overlapped with Article 85(3), exemption from general proscriptions of anticompetitive behavior. Under Article 86, Tetra Pak was clearly a "dominant" firm, holding a ninety percent share of the market affected by the patent. Therefore, the Commission found that the acquisition of the new exclusive license was an "abuse" of Tetra Pak's dominant position. On the other hand, because the patent license indisputably qualified for an Article 85(3) exemption, the legal issue arose as to whether Article 86 applied to a license otherwise worthy of an exemption under Article 85(3).

Even though Tetra Pak focuses on a patent license, the holding has significance beyond the field of intellectual property. "Block exemptions," the Community's official derogations from its competition law, exclude categories of agreements encompassing diverse subjects, including patent licensing,\(^11\) know-how licensing,\(^12\) franchising,\(^13\) motor-vehicle distribution and servicing,\(^14\) specialization,\(^15\) maritime

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\(^7\) Id. art. 85(1).

\(^8\) Id. art. 85(2).

\(^9\) Id. art. 85(3).

\(^10\) Id. art. 86.


\(^12\) Commission Regulation 556/89 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Certain Categories of Know-How Licensing Agreements, 1989 O.J. (L 61) 1 [hereinafter Know-how-Licensing Block Exemption].

\(^13\) Commission Regulation 4087/88 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Categories of Franchise Agreements, 1988 O.J. (L 359) 46 [hereinafter Franchising Block Exemption].

\(^14\) Commission Regulation 123/85 of 12 December 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Motor Vehicle Distribution and
transport, and research and development. This Note will demonstrate that Tetra Pak calls into question the efficacy of any and all block exemptions held by a firm with market power, for once the firm abuses its dominant position and activates Article 86, the offending agreement loses block-exemption protection.

Section I of this Note presents an overview of the Tetra Pak case. Section II provides background to EC competition law institutions. Section III is a compendium of EC competition law, specifically Articles 85 and 86. This Section also reviews the procedure and enforcement mechanisms of competition law in the EC. Section IV returns to Tetra Pak and summarizes the process before the Commission and the Court of First Instance. Finally, Section V explores the implications of the Tetra Pak holding for future competition in Europe and suggests steps firms may take to avoid infringing Articles 85 and 86.

I. Background: Parties and Agreements

A. Tetra Pak Rausing SA

Tetra Pak, registered in Switzerland and privately owned, is the world's largest producer of paper cartons for packaging milk and other

Servicing Agreements, 1985 O.J. (L 15) 16 [hereinafter Motor Vehicle Block Exemption].


18. The intellectual property right at issue in Tetra Pak was acquired by means of a merger with a firm holding the exclusive patent license in question. One must consider, then, what significance this corporate acquisition may have under Articles 85 or 86. The Court of Justice has held that a merger may infringe Articles 85 and 86. Case 6/72, Europemballage v. Commission, 1973 E.C.R. 215, 247, 1973 C.M.L.R. 199, 226. In the context of mergers and changes of corporate structure, the Commission and the Court have explored numerous applications of Article 85, see generally Frank L. Fine, Mergers and Joint Ventures in Europe: The Law and Policy of the EEC 6-28 (1989), and Article 86, see generally id. at 29-39. No comprehensive Merger Control Regulation was adopted until 1989. See Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations Between Undertakings, 1989 O.J. (L 395) 32. See generally Paul D. Callister, Note, The December 1989 European Community Merger Control Regulation: A Non-EC Perspective, 24 Cornell Int'l L.J. 97 (1991).

Nonetheless, in Tetra Pak the merger was held to be irrelevant. Tetra Pak's takeover of Liquipak was no more than the means by which Tetra Pak came into possession of its exclusive license, a fact to which the Commission "attached no particular significance." Tetra Pak, [1991] 4 C.M.L.R. at 584. Consequently, since it was not at issue in Tetra Pak, this Note will not consider further the problem of mergers in the EC.
liquids. At the time of the Commission decision, Tetra Pak had subsidiaries in all Member States of the EC except Greece and Luxembourg. In 1985 its enviable market shares within the Common Market were 89.1 percent of sterilized cartons sold and 91.8 percent of sterilized packaging machines leased or sold and still operating.

Tetra Pak's packaging method originally involved sterilizing continuous rolls of material before it was shaped into containers.

B. The Patent License

The British Technology Group (BTG), meanwhile, acquired a patent for a process employing ultraviolet light to enhance the sterilizing properties of hydrogen peroxide. Because BTG's new process would allow the efficient sterilization of pre-formed containers, it was potentially a significant advance in ultra-high temperature (UHT) packaging.

In 1981, BTG's predecessor granted patent and know-how licenses for its ultraviolet/hydrogen peroxide process to a subsidiary of the Liquipak Group, which in 1983 assigned the licenses to Liquipak International BV ("Liquipak Int'l"). Subsequently, Liquipak Int'l entered into an arrangement with a Norwegian group called Elopak, which planned to enter the aseptic packaging market. By 1986, with the assistance of Elopak, Liquipak Int'l had created a new filling machine that utilized the BTG process, although it had yet to be "tested in practice."

In 1986, Tetra Pak acquired three Liquipak companies, including Liquipak Int'l. BTG did not object to transferring the exclusive

19. Tetra Pak's sales for 1990, in 109 countries, were projected at 60 billion cartons, with revenues of $5 billion. Peter Fuhrman, Boxed In, FORBES, Oct. 29, 1990, at 102. A basis of success for this international concern is a patented container, made from paper, plastic, and aluminum, with the capacity for keeping out air during the filling process. Id. In addition, Tetra Pak manufactures and distributes the machinery used in filling its cartons, and Tetra Pak was one of the first developers of machinery used in filling "aseptic" (sterilized) liquid food containers. Tetra Pak Comm'n Decision, 1988 O.J. (L 272) at 27.

21. Id. at 45, Table 1.
22. Id. at 46, Table 2.
23. Id. at 30.
24. "BTG is a self-financing public undertaking whose main task... is licensing for commercial exploitation the results of public research in industry in the United Kingdom and elsewhere." Id. at 28.
25. Id. at 30.
26. A "know-how license" covers "additional information" and "incidental tricks that help in putting [an] invention to best use." Cornish, supra note 1, at 186.
27. Tetra Pak Comm'n Decision, 1988 O.J. (L 272) at 28.
licenses to Tetra Pak and announced that it would negotiate to extend the exclusive licenses after their expiration in 1988. As a result of Tetra Pak's takeover, however, Elopak ended its collaboration with Liquipak, and made a complaint to the Commission in June 1986, alleging that Tetra Pak had infringed Articles 85 and 86.

C. EC Commission Decision

The Commission held that Tetra Pak had violated EEC competition law because, as a result of the exclusive license, Tetra Pak had prevented Elopak and other potential competitors from entering the market for aseptic packaging, thereby unduly strengthening its own position in the market, an abuse of dominant position in violation of Article 86. Further, in conjunction with BTG, Tetra Pak had infringed Article 85(1) in such a way that the BTG-Tetra Pak agreement was not exempt under Article 85(3). Although the Commission did not fine Tetra Pak because its “contraventions of the rules of competition were relatively novel,” it forced Tetra Pak to relinquish its exclusivity, even though BTG would have preferred to issue only an exclusive license.

Hence, the issue was joined. Would a company found to have abused its dominant position merely by acquiring an exclusive patent license relinquish the privileges of its block exemption, and would the exclusive license be rendered void? The Court answered in the affirmative.

II. EEC Competition Law and Community Institutions

To aid in evaluating the impact of the Tetra Pak judgment upon large firms doing business in Europe, this Section will briefly look at EEC legal structures. This review will include the Council, the Commission, and the Community's courts, which enforce the commands of EEC law found in the Treaty of Rome and its ancillary legislation.

The foundation of all EEC law is the Treaty of Rome, the constitutive document of the Community, which now consists of twelve Member

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31. Id. at 29.
33. Id. at 379.
34. Id. Elopak filed its application pursuant to Council Regulation 17 of 6 February 1962, 1959-1962 O.J. English Spec. Ed. (L 13) 87, 204 [hereinafter Regulation 17], the implementing legislation of Articles 85 and 86. The Commission may, upon application by “natural or legal persons who claim a legitimate interest,” id. art. 3(2)(b), require an agreement infringing Articles 85 or 86 to be terminated. Id. art. 3(1).
35. Tetra Pak Comm’n Decision, 1988 O.J. (L 272) at 33.
36. Id. at 43. See infra notes 95-97 and accompanying text.
37. Tetra Pak Comm’n Decision, 1988 O.J. (L 272) at 43.
38. Id. at 43-44.
States. The Single European Act of 1987 amended the Treaty, which had originally called for the establishment of a "Common Market." Designed to "eliminate . . . quantitative restrictions in regard to the importation and exportation of goods . . . and abolish . . . obstacles for the free movement of persons, services and capital . . . ," the Single European Act set December 31, 1992, as the deadline for the establishment of an "internal market."

A. The EC Commission and the Council

All EEC legislation results from the interaction of the Commission and the Council. The Treaty delegates exclusive authority to adopt legislation to the Council, which is made up of one minister representing each Member State. Generally, the Commission, a professional civil service described as the "guardian of the Treaty," possesses sole power to propose legislation. The department of the Commission that deals with competition matters and enforces Articles 85 and 86 is the Directorate General IV, known as "DG IV." The head of DG IV is called the Director General. Final Decisions must be approved by the full seventeen-member Commission.

Article 189 of the Treaty empowers the Council and Commission to issue "Regulations," which are binding law within the Member States. Regulations embody a great deal of the Community's competition law. The Commission also releases its findings in individual competition cases in the form of "Decisions," which, while clearly adjudicatory in

40. Member States are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 3-4 (1988).


42. EEC Treaty art. 2.

43. Id. art. 3(a).

44. Id. art. 3(c).

45. Id. arts. 145-46.


47. EEC Treaty art. 155. The EC Commission consists of seventeen individuals appointed by the governments of the Member States. The members of the Commission do not, however, act as representatives of their respective countries, nor do they take instructions from their home governments. They owe allegiance to the Community. HARTLEY, supra note 39, at 8-9.

48. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EEC COMPETITION LAW AND PRACTICE 152 (3d ed. 1986) [hereinafter EEC COMPETITION LAW].

49. Id.

50. Id. at 155.

51. EEC Treaty art. 189.
nature, are referred to as "legislation" within the Community. Under Article 189, a Commission Decision is binding upon any party (or Member State) to whom it is addressed.

B. The Court of Justice and Court of First Instance

The Treaty created the Court of Justice of the European Communities (ECJ). In 1989, the Council transferred jurisdiction over actions relating to the EEC rules of competition to the Court of First Instance of the European Communities (CFI). The legal authority for the CFI rests directly upon Article 168a of the Treaty of Rome, one of the amendments introduced by the Single European Act in 1987. Unsuccessful parties, interveners who are directly affected, Member States, and Community institutions may appeal "final decisions" of the CFI to the Court of Justice provided such appeal is initiated within two months of notification of the decision.

C. The Advocate General

The post of Advocate General is another important institution of EC
legal practice.59 The Court of First Instance may appoint one of its member judges to the position of Advocate General.60 An Advocate General must act "with complete impartiality and independence, to make, in open court, reasoned submissions on certain cases brought before the Court of First Instance in order to assist the Court . . . in the performance of its task."61 An Advocate General is a spokesman or spokeswoman solely for the public interest and represents neither the European Community nor any constituent Member State.62

The "Opinion" of the Advocate General, usually delivered at a separate hearing of the Court, may set out facts, expound the law, and comment on other legal matters.63 Opinions are not limited to points argued by the parties, for the Advocate General may "put forward an original solution, which had not occurred to the parties . . . ."64 EC Courts commonly cite Opinions delivered by Advocates General.65

III. The Structure of EEC Competition Law66

EEC competition law is encapsulated in Articles 85 and 86, which take priority over national legislation.67 The Court of Justice has stated that because Articles 85(1) and 86 "tend by their very nature to produce direct effects in relations between individuals, these Articles create
1992  E.E.C. Competition Law  139
direct rights . . . which the national courts must safeguard." 68 National authorities, then, create a "procedural and administrative framework" within which the rules of competition are to be applied. 69 Thus it is clear that Articles 85 and 86 are directly applicable law within Member States, and, further, that they create direct effects within national legal systems. 70 Competition law must therefore be viewed as Community-wide legislation.

Secondary legislation emitted by the Council and Commission is equally binding, for Article 189 of the Treaty explicitly states that a Regulation is "binding in every respect and directly applicable in each Member State," and, further, a Council or Commission Decision is "binding in every respect for the addressees named therein." 71 Rulings of the Court are binding as regards the case in question, including an annulment action arising under Article 173, which allows an individual to appeal an act of the Council or Commission, 72 Article 5 requires Member States, moreover, to "[ensure] the carrying out of the obligations . . . resulting from the acts of the institutions of the Community." 73

A. Article 85

Article 85 is directed against anticompetitive agreements. 74 Article 85(1) prohibits "any agreements between enterprises," 75 any decisions

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70. "The Court of Justice . . . tend[s] to use the two concepts of direct applicability and direct effects interchangeably." STEINER, supra note 40, at 18.
71. EEC Treaty art. 189.
72. Id.
73. Id. art 173.
74. Id. art. 5.
76. For the sake of consistency, this Note relies on the United Nations Treaty Series text, which translates the French entreprise and German Unternehmen as "enterprise." Commentators on EEC law more commonly employ the alternative translation, "undertaking." The words "enterprise" and "undertaking" are broadly applicable to "almost any legal or natural person carrying on activities of an economic nature, or having a reasonable degree of economic autonomy," including corporations, unincorporated associations, partnerships, and individual traders. Barack, supra note 75, at 40-41. See, e.g., Commission Decision 89/205 of 21 Decem-
by associations of enterprises and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market . . . .”77 Article 85(2) provides that “[a]ny agreements or decisions prohibited pursuant to this Article shall be null and void.”78 Article 85(3), however, empowers the Commission to carve out exceptions to Article 85(1) by declaring the latter “inapplicable” to agreements that “contribute [i] to the improvement of the production or distribution of goods or [ii] to the promotion of technical or economic progress [iii] while reserving to users an equitable share in the profit resulting therefrom . . . .”79 Yet the Commission’s authority to create exceptions to Article 85(1) is conditional, for an agreement cannot qualify for exemption if it will either [i] “impose on the enterprises concerned any restrictions not indispensable to the attainment of [EEC competition policy] objectives,”80 or [ii] afford such enterprises the possibility of “[eliminating] competition in respect of a substantial proportion of the goals concerned.”81

1. Individual Exemption and Block Exemption

In 1962 the Council adopted Council Regulation 17,82 which legislatively brings Articles 85 and 86 into force, and which enables the Commission to grant individual exemptions to qualified agreements,83 provided the parties have “notified” their agreements to the Commission.84 Three years later, the Council expanded the Commission’s exempting powers by promulgating Regulation 19/65,85 which enables the Commission, by means of regulations, to exempt certain categories of agree-
ments and concerted practices from the restrictions of Article 85(1).\(^{86}\) The Council's action was the inauguration of block exemption, and the Commission has periodically formulated new exemptions for categories of agreements.\(^{87}\)

2. The Patent-Licensing Block Exemption

Among the exemptions devised in the wake of Regulation 19/65\(^{88}\) was the Patent-Licensing Block Exemption, addressing patent-licensing agreements as well as agreements combining the licensing of patents and the communication of know-how.\(^{89}\) Under this Regulation, BTG's exclusive licensing agreement with Tetra Pak qualified for exemption.

Article 1 of the Patent-Licensing Block Exemption exempts certain types of patent agreements from the provisions of Article 85(1). In Article 3, as is typical with other block exemptions, a "black list" specifies types of patent agreements that remain expressly forbidden. Somewhat retronymically, the list of agreements not infringing EEC law is referred to as the "white list," set down in Article 2. Article 4 sets up the "opposition procedure," under which a firm notifying an agreement to the Commission, and hearing no objections within six months, may enjoy an exemption-by-default from Article 85(1).\(^{90}\)

The patent-licensing exemption reflects the Commission's experience with thousands of applications and notifications. The Commission makes it clear, however, that certain kinds of agreements, including patent pools, joint ventures, reciprocal licensing, and plant breeder's rights, are not included within the block exemption because "experience so far acquired is inadequate" to warrant their exemption.\(^{91}\) Article 5 omits these types of agreements from the categorical exemption for patent licenses.\(^{92}\)

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86. Id. art. 1.

87. See Patent-Licensing Block Exemption, supra note 4; Know-how-Licensing Block Exemption, supra note 12; Franchising Block Exemption, supra note 13; Motor Vehicle Block Exemption, supra note 14; Specialization Block Exemption, supra note 15; Maritime Transport Regulation, supra note 16; R&D Block Exemption, supra note 17; Commission Regulation 1983/83 of 22 June 1983 on Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution Agreements, 1983 O.J. (L 173) 1 (as corrected)[hereinafter Exclusive-Distribution Block Exemption]; Commission Regulation 1984/83 of 22 June 1983 on Application of Article 85(3) of the Treaty to Categories of Exclusive Purchasing Agreements, 1983 O.J. (L 173) 5 (as corrected) [hereinafter Exclusive-Purchasing Block Exemption].

88. "[T]he Commission may . . . declare that Article 85(1) [of the Treaty] shall not apply to categories of agreements . . . which include restrictions imposed in relation to the acquisition or use of industrial property rights—in particular of patents, utility models, designs or trademarks . . . ." Regulation 19/65, supra note 85, art. 1.

89. Patent-Licensing Block Exemption, supra note 4, art. 1(1).

90. See infra notes 345-64 and accompanying text.


92. Id. art. 5.
3. Commission's Power to Withdraw Exemption

Any and every release from the requirements of Article 85(1), whether via a Regulation 17 individual exemption or a Regulation 19/65 block exemption, will be at the solitary volition of the Commission,\(^9\) for not even the Council or Court of Justice may create an exemption.\(^9\) Moreover, the EEC's secondary legislation provides for the rescission of exemptions at any time.\(^9\) Accordingly, the Patent-Licensing Exemption allows the Commission to withdraw block exemption

where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, and in particular where\(^9\) the licensed products or the services provided using a licensed process are not exposed to effective competition in the licensed territory . . . .\(^9\)

As one might expect, the Commission remains vigilant over what it has bestowed.

This description of the Commission's power to end exemption completes the brief overview of Article 85, the first skein of EEC competition law. The parties to *Tetra Pak* before the Court of First Instance had to contend with the intertwining of the Patent-Licensing Block Exemption with the second major skein of EEC competition law, Article 86, the provision that deals with the abuse of dominant position.

B. Article 86\(^9\)

The *Tetra Pak* case centers around the Commission's Decision that Tetra Pak specifically infringed Article 86 upon procurement of an exclusive patent license by means of its acquisition of Liquipak Int'l.\(^9\) Article 86 provides that "[a]ny abuse . . . of a dominant position within the Common Market or in a substantial part of it shall be prohibited as incompatible with the Common Market in so far as it may affect trade between Member States."\(^10\)

1. Dominant Position

EEC authorities commonly define market dominance as a situation in which an undertaking enjoys a position of economic strength affording it the power to "act without paying attention to rivals, suppliers or pur-
The Commission has pointed out, however, that an enterprise need not achieve "absolute domination," for it will suffice if it can count on overall "global independence of conduct..."  The ECJ has warned that even the existence of discernible competition will not preclude a finding that a single firm is dominant.

a. Relevant Product Market: Demand and Supply Substitution

Indisputably, a market-dominant firm must hold sway in a specified market, and accurate definition of the relevant market is crucial.

(1). Demand Substitution

In order to define this market, the Commission typically looks at the possibility of both "demand substitution" and "supply substitution." Demand substitution refers to the ability of consumers to find "perfect substitutes" for a product. When an undertaking's product is "non-perfectly substitutable," consumer demand will not be highly dependent upon the price of alternative items. In United Brands, for example, the Court confined the relevant market to bananas, because it considered bananas an imperfect substitute for oranges or apples. An increase in the price of bananas, for example, would not prompt consumers to switch to apples, as the two fruits are not interchangeable. Recent cases before the Commission argue for the continuing viability...


105. Tetra Pak Comm'n Decision, 1988 O.J. (L 272) at 36.

106. Id.


of this approach to market definition.\textsuperscript{110}

(2). Supply Substitution

On the supply side, the Commission looks at prospects of substitution from the producer's standpoint. For example, in \textit{Continental Can}, the ECJ asked how easily the makers of cylindrical cans could begin making the varying shapes customary for canned meat and fish.\textsuperscript{111} In a similar fashion, the Commission in \textit{Tetra Pak} looked at various alternatives for milk packaging (glass bottles, plastic bags, plastic bottles, and cartons) and found that competing suppliers could not readily convert their output without onerous investment in new equipment and know-how.\textsuperscript{112} Thus the Commission concluded that the relevant market was solely the market for UHT packaged milk, as opposed to the general milk market or beverage market, because in order to package UHT milk, a producer could switch to aseptic packaging only through burdensome investment in new technology. In sum, there was little prospect of supply substitution.

b. Relevant Geographic Market

As part of its analysis of dominant market position \textit{vel non}, the Court and Commission must define the geographic market, the area where "the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated."\textsuperscript{113} An important criterion for determining the relevant geographic market is that the area present no economic barriers to sales.\textsuperscript{114}

The Commission looks at the facts of a given case to find the necessary geographic homogeneity to demarcate the relevant market. For example, the Commission determined that the relevant geographic market for a firm's \textit{transmission} of navigation signals was the territory in

\begin{itemize}
\item \textsuperscript{110} See, e.g., \textit{Magill TV Guide}, 1988 O.J. (L 78) 43. (weekly TV guides sold to consumers constituted a relevant market distinct from daily listings printed in newspapers because daily listings only substitutable to a limited extent for advance listings); Commission Decision 88/469 of 20 July 1988 (IVECO/Ford), 1988 O.J. (L 290) 99 (heavy vehicles of a greater or lesser gross weight must be taken into account in so far as they are regarded by customers as substitute products); Commission Decision 89/113 of 21 December 1988 Relating to a Proceeding under Articles 85 and 86 of the EEC Treaty (Decca Navigator System), 1990 OJ. (L 43) 27 [hereinafter \textit{Decca Navigator System}] (navigation signal not interchangeable with other transmissions constituted a separate service market).
\item \textsuperscript{112} \textit{Tetra Pak Comm'n Decision}, 1988 O.J. (L 272) at 37.
\item \textsuperscript{113} \textit{United Brands}, 1978 E.C.R. at 270, [1978] 1 C.M.L.R. at 481.
\item \textsuperscript{114} See, e.g., Commission Decision 88/138 of 22 December 1987 Treaty (Eurofix-Bauco v. Hilti), 1988 O.J. (L 65) 19, 31 (relevant geographic market for nail guns was the entire Common Market due to absence of any artificial barriers, and products could be transported throughout the EC without excessive costs).
\end{itemize}
which the signals could be received. On the other hand, the geographic market for the receiver sets sold by the same firm was the entire Common Market because the receivers could be sold in all Member States and competitors confronted one another on more or less equal terms throughout the EC.

c. "Substantial Part of the Common Market"

Because the text of Article 86 refers somewhat vaguely to "a substantial part of the Common Market," the Court of Justice has clarified this language. The Court has held that domination need not extend beyond the area of a market consisting of two or more Member States. It is also clear that the territory of either a large or middle-sized State will constitute a substantial part of the Common Market.

In the view of the ECJ, findings relating to actual territory of a market are less determinative than a "quantitative assessment" of the market's economic importance within the Common Market as a whole. Thus the Commission was able to find, for example, that an undertaking whose navigational transmissions were available in certain offshore waters was operating in a "substantial part of the Common Market" within the meaning of Article 86 because it was the only navigational signal available in the area. The Community's approach to the definition of relevant market is well summarized in the recent Sabena case, in which the Commission referred to the "relevant market" as "all substitute products existing in a given geographic area in which the conditions of competition are sufficiently uniform to enable the economic power of the undertakings in question to be judged."

d. Effect on Trade within the Common Market

One element of an infringement of Article 86 is that an abuse of domi-
nant position must "affect trade between Member States." The Court of Justice has articulated an often-cited standard for affecting trade:

For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.\textsuperscript{124}

The ECJ has further held that specific effects need not be shown so long as an undertaking's conduct may potentially affect trade within the Common Market.\textsuperscript{125} Although the test of "affecting trade" is relatively easy to pass, a complainant must show that the challenged agreements will have some consequence in international trade. Therefore, agreements that are played out solely in one State will generally not be found to affect trade.\textsuperscript{126} In practice, however, any showing that a firm has traded its products across national boundaries will fulfill the Article 86 requirement of affecting trade.\textsuperscript{127}

e. Market Share

The Court of Justice has stressed that a chief factor tending to show dominant position is a large share of the relevant market over a period of time, because "by virtue of that share [an enterprise is] in a position of strength which makes it an unavoidable trading partner [having secured the] freedom of action which is the special feature of a dominant position." The Court of Justice has created fairly clear guidelines for analyzing absolute market share. In \textit{Hoffman-LaRoche}, the Court indicated that market-share percentages of seventy-five to eighty percent over three years are "so large that they are in themselves evidence of a dominant position."\textsuperscript{128} Further, an absolute market share of sixty-three to sixty-six percent over three years would be "evidence of the existence

\begin{footnotes}
\footnotetext[123]{EEC TREATY art. 86.}
\footnotetext[126]{Case 395/87, Ministère Public v. Tournier, 11 July 1989 \textit{(available in} LEXIS, Eurom Library, Cases File) (a purely national cartel will not affect trade within EC unless market share of members is extremely large); Case 22/78, Hugin Kassare-gister v. Commission, 1979 E.C.R. 1869, 1920, [1979] 3 C.M.L.R. 345, 373 (activities confined to London and 50-mile radius do not affect trade between Member States).}
\footnotetext[127]{\textsc{Bellamy \\& Child}, supra note 75, at 109. \textit{But see} infra notes 305-12 and accompanying text regarding a \textit{de minimis} exception.}
\footnotetext[129]{\textit{Id.}, 1979 E.C.R. at 527, [1979] 3 C.M.L.R. at 280.}
\end{footnotes}
of a dominant position."\textsuperscript{130}

In making its determination, the Court also looks at relative market shares and examines the "gap" between the alleged dominant market share and the share held by competitors. Thus, in Hoffman-LaRoche the Court considered the gap between the dominant firm's sixty-five percent share and its next competitors' respective 14.8% and 6.3% shares as evidence of market dominance.\textsuperscript{131} In a "narrow oligopolistic market," even a share of forty-seven percent, as against competitors's respective shares of twenty-seven percent, eighteen percent, seven percent, and one percent "proves that [an undertaking] is entirely free to decide what attitude to adopt when confronted by competition."\textsuperscript{132}

In its Tenth Report on Competition Policy (1981), the Commission noted that even a twenty to forty percent share of market could be consistent with market dominance,\textsuperscript{133} but usually would fall short of proving market power. Generally, a firm with a market share of less than five percent will be presumed incapable of posing an appreciable detriment to competition,\textsuperscript{134} but other factors may nevertheless cause a firm with a smaller market position to fall under Article 85(1).

f. Other Indicators of Dominance

Even when a corporation lacks a hefty market share, Community authorities will examine its competitive position. The Court of Justice has held that market dominance can be inferred from a number of factors, none of which, if considered separately, would be necessarily determinative.\textsuperscript{135} Thus, the Commission and Court may be receptive to competitors' complaints regarding "insuperable" obstacles, both practical and financial.\textsuperscript{136}

Among the numerous components that may reinforce a dominant position are national legislation,\textsuperscript{137} government licensing and planning regulations, statutory monopoly power, and protectionist laws shielding

\textsuperscript{130} Id., 1979 E.C.R. at 530, [1979] 3 C.M.L.R. at 282.
\textsuperscript{131} Id. See also Case 322/81, NV Nederlandische Banden Industrie Michelin v. Commission, 1983 E.C.R. 3461, 3509, [1985] 1 C.M.L.R. 282, 326 (57-65% share of the heavy-vehicle replacement tire market calculated against competitors' respective shares of four to eight percent is "valid indication of . . . preponderant strength").
\textsuperscript{132} Hoffman-LaRoche, 1979 E.C.R. at 525, [1979] 3 C.M.L.R. at 278.
\textsuperscript{135} See, e.g., Hoffman-LaRoche, 1979 E.C.R. at 520, [1979] 3 C.M.L.R. at 274-75.
\textsuperscript{137} Wissel, supra note 75, at 225. For example, a dominant firm's patent may prevent foreign competitors from entering a national market until the patent expires, unless there are alternative products that may be manufactured without infringing the patent.
domestic producers from foreign competition.\textsuperscript{138} Other elements bolstering a dominant firm's position are technological advantages,\textsuperscript{139} superior ability to make capital investment,\textsuperscript{140} effective vertical integration,\textsuperscript{141} or even a "very extensive and highly specialized sales network."\textsuperscript{142}

In short, Common Market competition law recognizes a full range of indicators of market dominance besides market share. In United Brands, the Advocate General's account of the respondent's commercial ascent in the banana trade reads like a catalog of plausible barriers to competition and therefore indicators of dominance:

The exceptionally heavy capital requirements for establishing and maintaining banana acreage, the encroachment of diseases that to date have forced successive shifts in the locale of growing areas, the recurrent blow-down and floods that dictate multiple sources of supply as safety insurance, and the exceptionally demanding logistics of distribution for an almost uniquely perishable major trade commodity—all of these united to make large-scale, vertically integrated organization a condition of successful operation.\textsuperscript{143}

2. Abuse of Dominant Position

A firm does not violate EC law merely by achieving dominance because Article 86 prohibits only the abuse of a dominant position that affects trade between Member States.\textsuperscript{144}

a. Definition of "Abuse"

Although the text of Article 86 stops short of actually defining abuse of a dominant position, it lists particular abuses:

(a) the direct or indirect imposition of any negotiable purchase or selling prices or of any other negotiable trading conditions;
(b) the limitation of production, markets or technical development to the prejudice of consumers;
(c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or (d) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of the contract.\textsuperscript{145}

\textsuperscript{138} Id.
\textsuperscript{139} Hoffman-LaRoche, 1979 E.C.R. at 522, [1979] 3 C.M.L.R. at 276 ("technological advantages" sustained manufacturer's market power).
\textsuperscript{140} Id., 1979 E.C.R. at 522, [1979] 3 C.M.L.R. at 273.
\textsuperscript{141} Id., 1979 E.C.R. at 522, [1979] 3 C.M.L.R. at 276.
\textsuperscript{142} Id.
There is general agreement, however, that these examples do not constitute "an exhaustive enunciation of the sort of abuses of a dominant position prohibited by the Treaty." Fortunately, the ECJ has supplemented these examples with a two-prong definition of abuse of dominant position. First, there must be a restraint on competition, and, second, the dominant enterprise must have used "different [methods] from those which [govern] normal competition in products or services on the basis of the transactions of traders."

b. Strengthening of Market Position and Proportionality

An important element of abuse is that a concern use its power to strengthen market dominance "in such a way that the degree of dominance reached substantially fetters competition." In Tetra Pak, the Advocate General, citing Continental Can, described conduct fortifying dominance and substantially fettering competition as "the first decisive element of abusive conduct." Furthermore, the "means and procedure" used to strengthen market position are not relevant to finding abuse.

Another important command under EC law requires that an undertaking not limit competition disproportionally. United Brands delineated the concept of proportionality when it found an enterprise had abused its dominance when it "raised obstacles, the effect of which went beyond the objective to be obtained." The doctrine of proportionality was freshly recounted in Tetra Pak:

the undertaking in a dominant position may act in a profit-oriented way, strive through its efforts to improve its market position and pursue its legitimate interests. But in so doing it may employ only such methods as are necessary to pursue those legitimate aims. In particular it may not act in a way which, foreseeably, will limit competition more than is necessary.

c. Responsibility of Dominant Firms

No provision of the Treaty requires a dominant concern to conduct its business in a way that "makes no economic sense" or to act "against its

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legitimate interest,"¹⁵³ and indeed Article 86 "will even accept the total absence of any competition, i.e., a complete monopoly."¹⁵⁴ Nevertheless, a firm with market power is not free to roam untrammelled through the market, for, in practice, the European Community has hobbled dominant firms' conduct in two ways: First, the European Court of Justice has impressed upon each dominant enterprise a "special responsibility not to allow its conduct to impair genuine undistorted competition in the Common Market."¹⁵⁵ Second, the ECJ has devised an "objective" test for abuse, based on a number of diverse factors under which it judges dominant firms' conduct.

An enterprise may not be able to determine its special responsibility, for the Commission may characterize acts committed by a dominant firm as "abusive" while allowing the same conduct by less powerful undertakings under conditions of normal competition.¹⁵⁶ Thus Tetra Pak might well have been unaware that its acquisition of an exclusive patent license for arguably inoperable technology was anticompetitive abuse.

Ironically, the ECJ's "objective" definition of abuse, which ignores an undertaking's intent, does not settle the murkiness surrounding a dominant firm's responsibility: "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened . . . ."¹⁵⁷ The practice of using a plethora of traits to make an "objective" finding of dominance has brought criticism that the Commission has failed to develop a coherent, economically sound framework of analysis, preferring instead to consider a case-by-case check-list of factors.¹⁵⁸

Notably, the Court has accepted the view that "abusive" conduct itself may show dominant position. To find that a concern holds a dominant market position, "it may be advisable to take account . . . of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses."¹⁵⁹ In effect, the ECJ may find abuse of dominant position upon a showing of abuse, even before a

¹⁵⁶. BELLAMY & CHILD, supra note 75, at 409.
¹⁵⁸. 2 HAWK, supra note 52, at 801.
dominant position is established.\textsuperscript{160} This technique of inferring dominance from abuse of dominant position has probably not enhanced major EC enterprises' sense of legal certainty.

Thus, an internationally powerful enterprise must keep abreast of the potential effects of its agreements, first, by considering many "objective" factors leading to dominance and anticompetitive abuse, and, second, by fulfilling its special responsibility not to distort competition. As a result, a large firm may be unable to ensure that its contractual agreements are legal under Community law, and it may unintentionally abuse its dominant position.

In summary, the European Community will allow an enterprise to acquire a dominant position in a relevant market, even to the point of 100 percent market share, but any firm in a dominant position must not interfere with competition by abnormal means. As part of its special obligation, the dominant firm may not use its power to undermine the remaining competition in order to strengthen its position. It has the duty to proceed by means legitimately proportionate to its competitive aims.

3. \textit{Interrelationship of Articles 85 and 86}  

This part of Section III will consider the interaction of Articles 85 and 86, the core issue in \textit{Tetra Pak}.\textsuperscript{161} Both Articles 85 and 86 strive to maintain healthy competition in the Common Market,\textsuperscript{161} yet they play separate roles. First and foremost, the two provisions target different types of players in the market: Article 85 is directed at bilateral or multilateral agreements, whereas Article 86 reaches activity by a single firm as well.\textsuperscript{162} Therefore, although a single undertaking can abuse its dominant position, infringement of Article 85 requires collaboration or concerted action with another firm.

Second, Article 85 has a unique mechanism for creating exceptions to its prohibitions by means of individual exemption or block exemption, pursuant to Regulations 17 and 19/65, respectively. The Court of Justice has stated that the Commission cannot create express exceptions to the interdictions of abusive market power under Article 86.\textsuperscript{163} In effect, Article 86 stands as an absolute prohibition. Furthermore, since Article 86 is a provision of the EEC constitution, it preempts exemptions extended by the Commission under powers emanating from secondary

\textsuperscript{160} One critic of the Court's approach, arguing that the ECJ has forged a "causal link" between dominance and abuse, has warned that "one should be careful to distinguish which way the causation runs" in order to avoid a wholly circular definition of abuse of dominant position. \textit{2 Hawk, supra} note 52, at 824. This approach may, in the words of another authority, "give rise to rather circular reasoning, and should be treated with caution." \textit{Bellamy & Child, supra} note 75, at 408 n.58.


\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.}
legislation.\textsuperscript{164} The Commission recapitulated this precept six months before \textit{Tetra Pak} was decided, stressing that agreements resulting from an abuse of dominant position cannot enjoy exemption, either under Regulation 17 individual exemptions or under group exemption.\textsuperscript{165}

On the other hand, an undertaking that is unquestionably dominant within the terms of Article 86 can enjoy block exemption, provided its agreement fulfills all the conditions set forth by Article 85(3). For example, Tetra Pak did not have to forego the exclusivity of its patent license due to its sheer dominance, but rather because it could not comply with exemption qualifications. The Commission invoked the withdrawal clause of the Patent-Licensing Block Exemption,\textsuperscript{166} exercising its discretion to disallow exemption whenever an exempted agreement fails to meet the conditions of Article 85(3).\textsuperscript{167}

As "guardian of the Treaty," the EC Commission often focuses on the basic purposes of the Treaty, especially the general forbiddance of "prevention, restriction or distortion of competition."\textsuperscript{168} The provisions of the treaty and secondary legislation encourage continuous vigilance. First, Articles 85(3)(a) & (b) provide explicit conditions for extending exemption initially; second, Regulation 17 expressly authorizes the Commission to revoke individual exemption whenever a party abuses an exemption;\textsuperscript{169} and third, Regulation 19/65 expressly allows withdrawal of block exemption whenever the Commission finds that an exempted agreement has "certain effects which are incompatible with the conditions laid down in Article 85(3)."\textsuperscript{170} This statutory fail-safe mechanism, which urges constant review of agreements in light of the Treaty's basic tenets, dovetails with the European Court's "teleological" interpretation\textsuperscript{171} of the provisions of Articles 85 and 86.

4. Interpretation of Articles 85 and 86

Community institutions have interpreted Articles 85 and 86 to serve the overall aims of the Common Market. Although the European Court


[Un]like in Article 85(3) no provision is made in the EEC Treaty for any exemption from the prohibition on abuses of dominant positions, nor is any such exemption conceivable: abuses cannot be approved, or at any rate not in a community which recognizes the rule of law as its highest principle. (citation omitted).

\textsuperscript{165} Decca Navigator Systems, 1989 O.J. (L 43) at 45. See also Continental Can, 1973 E.C.R. at 244, 1973 C.M.L.R. at 224 (restriction of competition cannot be allowed by virtue of fact that a dominant firm is successful).

\textsuperscript{166} Tetra Pak Comm'n Decision, 1988 O.J. (L 272) at 42.

\textsuperscript{167} See Patent-Licensing Block Exemption, supra note 4, art. 9. This power to revoke the benefit of an exemption is, however, rarely used. Bellamy & Child, supra note 75, at 373.

\textsuperscript{168} EEC Treaty art. 85(1).

\textsuperscript{169} Regulation 17, supra note 34, art. 8(3)(d).

\textsuperscript{170} Regulation 19/65, supra note 85, art. 7. See also Patent-Licensing Block Exemption, supra note 4, art. 9.

\textsuperscript{171} See infra notes 172-79 and accompanying text.
usually begins with a literal interpretation of the Treaty, the Court of Justice has shown a marked preference for focusing on the purposes of the Treaty. In this regard, the Court has held that the guiding design of the competition-law Articles is to preserve the principles of Article 2 and Article 3(f) of the Treaty. Article 2, the more general of the two provisions, sets out as the EEC's task the promotion of "a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relationships between its Member States." In turn, Article 3(f) directs the Community to establish a "system ensuring that competition should not be distorted in the Common Market."

Although critics have complained that this teleological approach leads to unpredictable interpretations of Treaty provisions, the method seems to have met with general acceptance as having yielded sufficiently coherent legal principles. In effect, the Court views the individual competition Articles as crystalizations of the overriding goals of the European Community.

C. Special Problems of Intellectual Property

_Tetra Pak_ clarified the relationship between abuse of dominant position under Article 86 and group exemption under Article 85(3), regardless of subject matter. Nevertheless, _Tetra Pak_ also reveals the parallel demands made by national patent law and Community-wide competition law. Like other intellectual property rights, patents are created by national

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173. Id. at 74.
175. EEC TREATY art. 2.
176. Id. art. 3(f).
178. Id. at 104.
180. The term "intellectual property," includes patents, copyrights, trademarks, industrial designs, know-how, and attendant licenses and rights. "Industrial property" is a nearly synonymous term although it may not reach copyrights for artistic works. See generally B. I. CAWTHRA, _INDUSTRIAL PROPERTY RIGHTS IN THE EEC: PATENTS, TRADEMARKS, AND COPYRIGHT_ (1973); CORMISH, supra note 1; PATRICK HEARN, _THE BUSINESS OF INDUSTRIAL LICENSING: A PRACTICAL GUIDE TO PATENTS, KNOW-HOW, TRADEMARKS AND INDUSTRIAL DESIGN_ (2d ed. 1986); HARTMUT JOHANNES, _INDUSTRIAL PROPERTY AND COPYRIGHT IN EUROPEAN COMMUNITY LAW_ (1976).
181. See generally CAMPBELL, supra note 46, at 91-141; Goyder, supra note 52, at 253-295; 2 HAWK, supra note 52, at 575-735; WHISH, supra note 75, at 345-383.
legislation, which, in effect, grants a monopoly for exploitation of the technology or process.182

The Commission has had to address the tension that results when state-based intellectual property rights undermine the policies favoring undistorted competition and free movement of goods within the Community.183 Article 222 of the Treaty further aggravated the problem by providing that the "Treaty shall in no way prejudice the system existing in Member States in respect of property,"184 which of course includes intellectual property rights. Finally, there is at present no provision for a Community-based patent system.185

The inherent conflict between nationally recognized intellectual property rights and the Community goal of encouraging the "free movement of goods" has been minimized by a string of cases in the Court of Justice. The Court has articulated the principle that, on the one hand, "the Treaty leaves the existence and substance of industrial property rights untouched (the national legislature decides on these questions . . .),"186 but on the other hand, "their exercise is completely subject to Community law."187 As recently as 1990, the Court repeated its support of the existence/exercise dichotomy in the context of abuse of dominant position under Article 86.188

Thus, the Court regards intellectual property rights, hovering as they do between the Community Treaty and national law, as ambivalent creatures, born in a single State but being exercised within the Community as a whole. Consequently, even though the exclusive agreement between British Technology Group and Tetra Pak was based upon a pat-

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182. See BELLAMY & CHILD, supra note 75, at 319-20.
183. See, e.g., EUROPEAN COMMISSION, FIRST REPORT ON COMPETITION POLICY 59 (1972).
184. EEC TREATY art. 222.
185. The Community Patent Convention, signed by all EC Member States in 1975, is intended to "provide automatic protection for all patented inventions to owners resident in Member States, without there being any need to designate those countries in which the patent is required to operate." HEARN, supra note 180, at 55. An applicant would retain the right to obtain a national patent, however. CORNISH, supra note 1, at 77 n.80. This Convention may become effective as early as December 31, 1992, but a number of obstacles must be overcome. See id. at 77-78.
ent which came into existence under U.K. law, its exercise within the Common Market subjected the agreement to scrutiny by the Community Commission.189

D. EC Jurisdiction over Non-EC firms

In Tetra Pak, neither party was a Common Market firm. Tetra Pak was registered in Sweden and complainant Elopak was Norwegian. Nevertheless, the European Community has jurisdiction over agreements between non-EC firms which affect competition within the Common Market.

Article 85 expressly prohibits agreements "which have as their object or result the prevention, restriction or distortion of competition within the Common Market . . . ."190 Similarly, Article 86 forbids abuses by dominant firms "within the Common Market or within a substantial part of it in so far as it may affect trade between Member States."191 The geographical phrase "within the Common Market" implies that the Community has jurisdiction over any agreement that manifests effects within the Common Market.192 Relatively early on, the Commission stated that EC law applies to any restriction of competition that may "produce within the Common Market effects set out in Article 85(1)."193

The Court of Justice recently clarified the jurisdictional inquiry by endorsing the "qualified effects" standard,194 first articulated by the Advocate General in the Dyestuffs case. Under this standard, the EC may exercise its jurisdiction over foreign enterprises whenever anticompetitive conduct evinces a direct and immediate, reasonably foreseeable, and substantial effect within the Community.195 This jurisdictional criterion is generally accepted under international law.196

189. See Tetra Pak, [1991] 4 C.M.L.R. at 363-65 (A.G. Opinion). This aspect of EEC competition law became an underlying motif in the Tetra Pak litigation. Further consideration of this problem, however, is beyond the scope of this Note. See also Patent Licensing: Advocate-General's Opinion that Agreement Entitled to Benefit of Article 85(3) Block Exemption May None the Less Contravene Article 86, 12 E.I.P.R. D-117 (1990).

190. EEC TREATY art. 85(1) (emphasis added).

191. Id. art. 86 (emphasis added).

192. BARACK, supra note 75, at 37-38.


1. Enforcement and Procedure Under EEC Competition Law

Article 85(2) dictates that "any agreements or decisions prohibited pursuant to this Article shall be null and void." Article 86 states that "action... to take improper advantage of a dominant position... shall hereby be prohibited." The Treaty further calls upon the Council to use fines and penalties to compel compliance with the competition articles. Regulation 17 empowers the Commission, by releasing Decisions, to terminate agreements that infringe Articles 85 and 86.

The Commission may begin an enforcement action either "upon its own initiative," or upon application by a Member State or by "natural or legal persons who claim a legitimate interest." In practice, the Commission will generally investigate all but the most frivolous complaints. Tetra Pak's problems with the Commission began when Elopak made two applications pursuant to article 3 of Regulation 17, in which Elopak alleged that Tetra Pak had violated Articles 85 and 86.

2. Enforcement of EC Competition Law in National Courts

The ECJ has held that denying national courts jurisdiction to enforce directly applicable provisions of Community law would deprive individual citizens of EC Member States of rights created by the Treaty. Juxtaposed with this holding is the ECJ's further proscription that "[t]he imperative force of the Treaty... could not vary from State to State by the effect of internal measures..." As a result, both Community and national authorities enforce Articles 85 and 86, including the provision in Article 85(2) for automatic nullity of infringing agreements. The Court has consistently held, however, that whenever Community rules of competition conflict with national laws, "Community law takes precedence." Decisions of national courts applying EC law bind neither

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197. See generally Barack, supra note 75, at 219-301; Carol M. Crosswell, Legal and Financial Aspects of International Business 22-43 (1980); Hawk, supra note 52, at 17-145; C. S. Kerse, EEC Antitrust Procedure (2d ed. 1988); Whish, supra note 75, at 243-263.
198. EEC Treaty art. 85(2).
199. Id. art. 86.
200. Id. art. 87(2)(a). The Commission may levy a fine of 1,000-1,000,000 units of account for the intentional or negligent infringement of Article 85(1) or Article 86. Regulation 17, supra note 34, art. 15(2). A unit of account, or "Ecu," is based on a "market basket" of currencies, and as of January 1992 one unit was equivalent to approximately $1.34 or DM 2.04. 1992 O.J. (C 1) 1 (information of the Commission).
201. Regulation 17, supra note 34, art. 5(1).
202. Id.
203. Id. art. 3(2)(a) & (b).
204. Kerse, supra note 197, at 61.
205. Tetra Pak Comm'n Decision, 1988 O.J. (L 272) at 27.
208. See, e.g., Walt Wilhelm, 1969 C.M.L.R. at 119.
the Community Commission nor Courts. Should controversies arise regarding interpretation of the Treaty, acts by Community institutions, or interpretation of EC legislation, a national court may request a preliminary ruling from the Court of Justice.209

IV. Tetra Pak's Case

This section will outline the arguments Tetra Pak presented in defense of its exclusive patent license, contentions rejected by the Commission and ultimately by the Court of First Instance. One should remember, however, that the sole issue before the Court was the applicability of Article 86 when an agreement has qualified for Article 85(3) block exemption.

A. Tetra Pak's Defense Before the Commission

By the time of its oral hearing before the Commission, Tetra Pak had voluntarily relinquished its exclusive patent license on BTG's patented ultraviolet sterilization process.210 Even though both Tetra Pak and BTG preferred an exclusive agreement, Tetra Pak and Elopak were negotiating with BTG for nonexclusive licenses.211

In its defense, Tetra Pak argued, first, that it held no dominant position in the relevant market and had consequently committed no abuses infringing Article 86, and, second, that its patent license fell within the Patent-Licensing Block Exemption.212 Tetra Pak also maintained that "further development on the basic technology" covered by the BTG license would "require a considerable financial investment" on the part of Tetra Pak.213

1. Infringement of Article 86

Rejecting all of Tetra Pak's defenses, the Commission decided that Tetra Pak had abused its dominant position in the relevant market. The Commission defined the product market as "machines and technology for filling board cartons under aseptic conditions with UHT treated liquids, ... especially milk."214 It found the geographic market to be the entire EC because, first, even though demand varied slightly among Member States, there were significant markets for every kind of packaging and filling machines in each State,215 and, second, transportation costs did not erect barriers along national boundaries.216

The Commission supported its finding of dominance by citing five factors: (1) Tetra Pak's large market share, 91.8 percent for aseptic fill-

209. EEC Treaty art. 177. See infra notes 285-86 and accompanying text.
211. Id.
212. Id.
213. Id. at 31.
214. Id. at 33.
215. Id. at 38.
216. Id.
ing machines for UHT products; (2) Tetra Pak’s early development of UHT technology, vast experience, and protection by various patents; (3) particularly high barriers to market entry; (4) Tetra Pak’s exclusive access to BTG technology, which would reinforce its technological lead over potential rivals and reduce the possibility of effective competition; and (5) the maturity of the milk market, allowing no room for overall expansion.\textsuperscript{217}

Having established Tetra Pak’s dominance, the Commission found that Tetra Pak had abused its position because it had \textit{strengthened} its dominant position by using \textit{disproportionate} means. First, the acquisition of the exclusive patent not only strengthened Tetra Pak’s existing dominance but also prevented, or considerably delayed, the entry of any new competition.\textsuperscript{218} Citing Continental Can, the Commission declared that “[a]buse may occur if any undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition . . . .”\textsuperscript{219}

Tetra Pak’s exclusivity was an affront to the EC’s principle of proportionality because Tetra Pak could easily have continued its operations with a non-exclusive patent. In the Commission’s words, the exclusivity of the license could not be “objectively justified” because “the little protection that may be necessary to encourage Tetra [Pak] to bear any technical and commercial risks associated with the development and dissemination of new technology is not sufficient to overcome the extremely serious disadvantages created by the loss of competition entailed by this exclusivity.”\textsuperscript{220}

Regarding the “effect on trade between Member States,” the Commission determined that Tetra Pak’s exclusive license, which covered virtually the entire Common Market, exhibited the requisite substantial impact on competition within the EC.\textsuperscript{221}

To summarize, the Commission found that Tetra Pak infringed Article 86 because (1) it was the dominant undertaking in the relevant market, (2) it abused its dominant position by using an exclusive patent affording competitive advantages disproportionate to its legitimate business interests, and (3) the abuse affected trade between Member States.

2. \textit{Infringement of Article 85}

The Commission determined that, although the “exclusivity of the license fell within the scope of Article 85(1),” the specific restrictions within the BTG-Tetra Pak agreement conformed with the “white list” of the Patent-Licensing Block Exemption.\textsuperscript{222} Nevertheless, the otherwise automatic exemption of the agreement failed because, inasmuch as

\textsuperscript{217} Id. at 39.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 40.
\textsuperscript{220} Id. at 41.
\textsuperscript{221} Id. at 40.
\textsuperscript{222} Id. at 41-42. See supra notes 88-90.
Tetra Pak did not fulfill the conditions of Article 85(3), the Commission would have withdrawn the exemption.225 Exclusivity may be exempted from Article 85(1) only when it is “necessary to encourage competition . . . but in other market circumstances where it is detrimental to competition it must fall within the scope of Article 85(1).”224

The license agreement failed to meet the conditions of Article 85(3) because there were no products or services within the territory capable of competing with Tetra Pak.225 Furthermore, consumers did not benefit from the elimination of competition.226 The resultant concentration of market power might even “hinder promotion of technical and economic progress . . . .”227 Finally, the exclusive license was never shown to be indispensable to any legitimate business advantage.228

The infringement of Article 85 was fairly plain. Having failed to meet the conditions of Article 85(3), the exemption was withdrawn, and Tetra Pak’s license agreement was caught by the provisions of Article 85(1) and rendered void by Article 85(2). As the license would tend to have as its “object or result the prevention, restriction or distortion of competition within the Common Market,”229 it was “automatically void.”230

B. Tetra Pak before the Court of First Instance

Tetra Pak applied to the Court of First Instance (CFI) for a declaration that the Commission’s decision was void as a matter of law. Tetra Pak did not appeal the Commission’s findings of market dominance or abuse, but claimed the Commission infringed Article 85(3) and Article 86 by applying Article 86 to an agreement exempt under Article 85(3).231

Tetra Pak posed three objections to the Commission’s treatment of its licensing agreement: (i) that a “schematic” analysis of Articles 85 and 86 precluded the Commission’s finding,232 (ii) that the Commission’s decision violated the principle of legal certainty,233 and (iii) that the Commission had violated the principle of uniform application of Community law.234

1. Tetra Pak’s “Schematic” Defense

Tetra Pak averred that, as Articles 85 and 86 aspire to the same objective—to protect undistorted competition within the Common Market—

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223. Id. at 33.
224. Id. at 42.
225. Id. at 43.
226. Id.
227. Id.
228. Id.
229. EEC Treaty art. 85(1).
230. Id. art. 85(2).
232. Id. at 381-82.
233. Id. at 387-88.
234. Id. at 389.
they should not be interpreted to contradict each other. According to Tetra Pak, by giving effect to Article 86 even when an agreement had been exempted under Article 85(3), the Commission would contradict itself by authorizing certain conduct under Article 85(3) while simultaneously prohibiting the same conduct under Article 86. As a consequence, until the Commission acts to withdraw exemption, an express block exemption under Article 85(3) should imply a concurrent exemption from the demands of Article 86.

2. Tetra Pak’s Legal Certainty Defense

Tetra Pak also argued that the principle of legal certainty precluded application of Article 86 to prohibit conduct that was exempt under Article 85(3). Tetra Pak sought to persuade the CFI that as long as the Commission had taken no positive action to withdraw an exemption, there was a legitimate expectation that an agreement was lawful.

Tetra Pak argued further that “negative clearance,” the procedure under which the Commission may specifically approve an agreement, could not assure legal certainty for a number of reasons. First, one of the “primary functions” of block exemption is to enable firms to enter agreements without having to consult the Commission; the negative clearance application requirement would “undermine the efficacy” of the exemption. Second, negative clearance does not protect an undertaking from incurring fines between the time of application and decision. Third, negative clearance may not be enforceable in national courts pending a Commission investigation. Finally, negative clearance has no binding effect in national courts.

3. Tetra Pak’s Uniform Application of Law Defense

Finally, Tetra Pak argued that if Article 86 abuse of dominant position applies to agreements qualifying for block exemption under Article 85, national courts are then empowered to prohibit conduct the EC Commission has expressly allowed. As this usurpation by a municipal court would undermine the principle of uniform application of Community law, Tetra Pak urged the Court to find, in the interests of consis-

235. Id. at 380.
236. Id.
237. Id.
238. Id. at 387.
239. Id. at 387-88.
240. “Negative Clearance. Upon application . . . the Commission may certify that, on the basis of facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision, or practice.” Regulation 17, supra note 34, art. 2. See infra notes 324-32 and accompanying text.
242. Id.
243. Id.
244. Id.
245. Id. at 389.
tency, that application of Article 86 is incompatible with the protections that block exemptions promise. 246

C. The Court's Response to Tetra Pak's Arguments

Although the Court of First Instance acknowledged that the Court of Justice had never expressly considered the issue of reconciling Article 86 with block exemption,247 it ruled that Tetra Pak's arguments were without merit, dismissed the application, and upheld the Commission Decision.248

1. CFI's Response to the Schematic Defense

The Court's first step in reconciling the application of Article 86 to an agreement to which the Commission had granted group exemption was to turn to a teleological interpretation249 of the Treaty: Articles 85 and 86 are complimentary rules, dedicated to the common objective embodied in Article 3(f), that competition not be distorted.250

Tetra Pak had urged that, even though Treaty provisions allowing for exemptions do not explicitly mention Article 86, the "implied exemption in respect of abuse of dominant position"251 demanded a two-step analysis similar to that under Article 85: (i) does the conduct in question have the "object or effect of preventing, restricting or distorting competition within the common market,"252 and (ii) "if so, does the conduct nevertheless have overall a pro-competitive effect because it contributes to promoting technical or economic progress."253 The Court, however, found this two-step approach unsuitable for Article 86, because of the absolute bar against abusive conduct.254

The CFI also rejected the claim that Article 86 should operate only after the Commission's positive action of withdrawing an exemption, on the grounds that this approach would be tantamount to creating a concurrent exemption from the prohibition of market-dominant abuse.255 The Court raised an additional ultra vires objection rooted in the hierarchy of legal rules of the European Community. Because the Treaty of Rome mandates the prohibition of abuse of dominant position, and since the Council has never promulgated secondary legislation allowing the Commission to make exceptions to Article 86, no secondary legislation would justify a derogation from Article 86.256 Thus, the CFI found Tetra Pak's theory of "implied exemption" constitutionally untenable.

246. Id.
247. Id. at 383.
248. Id. at 390.
249. See supra notes 172-79 and accompanying text.
251. Id. at 382.
252. Id.
253. Id.
254. Id. at 385.
255. Id. at 385-86.
256. Id.
The CFI also raised practical objections to Tetra Pak's arguments of implied or concurrent exemption. When the Commission investigates an application for individual exemption under Article 85(3), it will, in practice, consider compliance with Article 86. The same is not true for block exemptions, which, by definition, involve no case-by-case "positive assessment" of the conditions laid out in Article 85(3). As a result, abusive conduct is to be assessed strictly within the confines of Article 86, without reference to Article 85(1) and its permissible derogations. Thus, market dominance is irrelevant to an agreement's qualification for group exemption; under EEC law, the Commission will not deny a block exemption to a market-dominating firm. Block exemption does not, however, shield against an allegation of abuse.

2. Advocate General's Response to Schematic Defense

In response to Tetra Pak's schematic argument, Advocate General Kirschner resorts at the outset to a teleological interpretation, emphasizing Article 3(f) of the Treaty, which demands that competition not be "distorted." In reaching this goal, however, the application of either Article 85 or 86 may be sufficient. Further, Judge Kirschner cited a line of ECJ cases confirming that the two articles are concurrently applicable.

a. Article 86 and Individual Exemptions

In a digression, Advocate General Kirschner found four "indications" that Article 86 retains its force even after individual exemption has been achieved. First, quite simply, the plain language of Regulation 17 provides for exemption only from Article 85(1), not from Article 86. Second, in contrast to an individual exemption, which must specify time limits, conditions, and obligations, the absolute prohibition of abusive conduct can be neither limited nor subject to condition. Third, a "clear parallel" exists between Article 86's categorical prohibition and Regulation 17's provision that the Commission may revoke an exemption whenever

257. Id. at 386.
258. Id.
259. Id. at 345 (A.G. Opinion).
262. Id. at 349.
263. Id.
264. See Regulation 17, supra note 34, art. 8(1).
"parties abuse the [individual] exemption from the provisions of Article 85(1).\textsuperscript{266} Judge Kirschner concluded from this parallel construction that individual exemption cannot justify abusive conduct.\textsuperscript{267} Fourth, while the Commission may levy fines for intentional or negligent infringement of either Article 85(1) or 86,\textsuperscript{268} it may not impose a fine during its consideration of a request for individual exemption, provided the parties properly notify the agreement.\textsuperscript{269} From this Judge Kirschner concluded that for the duration of the decision process, Article 86 must continue "to be applicable and have effects," even though the Commission’s power to impose fines is suspended.\textsuperscript{270}

Moreover, an agreement properly notified and granted individual exemption will necessarily comply with the provisions of Article 86 because the Commission will thoroughly assess the agreement’s compliance with the conditions of Article 85(3), including benefit to consumers, proportionality of the restrictions imposed, and the maintenance of competition.\textsuperscript{271}

Turning to the problem of an agreement enjoying individual exemption to which a dominant enterprise subsequently accedes, Judge Kirschner noted that since such an agreement would remain unexamined in the context of competitive distortion by a dominant firm,\textsuperscript{272} the Commission may "reexamine ex nunc whether the exception from the prohibition laid down in Article 85(1) is still justified."\textsuperscript{273} In such a case, the Commission’s former exemption is not binding, and therefore the Article 85(3) exemption will, in fact, be subject to the undertaking’s compliance with Article 86.\textsuperscript{274}

b. Article 86 and Block Exemptions

Having thus demonstrated that the shield of individual exemption is ablated once a dominant firm commits abusive conduct in the atmosphere of a distorted, noncompetitive market, Judge Kirschner turned to the problem of block exemptions. He first established that all exemptions, whether individual or categorical, are based on the common assumption that the agreements they cover violate Article 85(1). Unlike Regulation 17 exemptions, however, which involve investigation by DG IV, block exemptions are grounded in a "general, abstract assessment," which assumes agreements are being launched under normal conditions

\textsuperscript{266} See Regulation 17, supra note 34, art. 8(1)(d).
\textsuperscript{268} See Regulation 17, supra note 34, art. 15(2).
\textsuperscript{269} Id. art. 15(5). "[F]ines [for intentional or negligent infringement of Articles 85(1) or 86] shall not be imposed in respect of acts taking place: (a) after notification to the Commission and before its decision in application of Article 85(3) or the Treaty . . . ." Id.
\textsuperscript{271} Id. at 350-51.
\textsuperscript{272} Id. at 351.
\textsuperscript{273} Id.
\textsuperscript{274} Id.
of competition. The secondary legislation that undergirds the Commission's power to create group exemptions, furthermore, refers expressly and exclusively to Article 85, and provides no exemption from Article 86. The Advocate General concluded that, just as the Commission is not bound by its granting of an individual exemption after a DG IV investigation, neither is it bound by a block exemption granted ex ante once a firm achieves dominance and commits market-abusive conduct. In short, Article 86 applies even when there is a valid block exemption.

3. CFI's Response to the Legal Certainty Defense

The CFI was unimpressed by Tetra Pak's arguments regarding legal certainty, and responded that block exemption is in fact designed to provide legal certainty. An exemption does not obviate a dominant firm's responsibility not to abuse its dominant position. Therefore, no firm can credibly defend its abusive conduct by pleading the alleged "unpredictability of the application of Article 86." This principle of the primacy and uniformity of EC law is not at all affected, however, by whether or not a dominant firm's agreement qualifies for block exemption.

4. CFI's Response to the Uniform Application Defense

The CFI was similarly unmoved by Tetra Pak's arguments regarding uniform application of Community law. The Court pointed to a consistent line of ECJ cases showing that Article 86 has direct effect and confers rights in national courts. This principle of the primacy and uniformity of EC law is not at all affected, however, by whether or not a dominant firm's agreement qualifies for block exemption.

V. Implications for Other Dominant Firms Attempting to Avoid 86

A. The Tetra Pak Precedent in the Court of First Instance

In the aftermath of Tetra Pak, the question arises as to whether this decision in the Court of First Instance establishes a precedent in the European Community. In the past, the Court of Justice, to which the CFI is attached, has tended to follow its own previous rulings, only excep-

275. Id. at 353.
276. The block-exemption regulations covering exclusive purchasing and exclusive distribution agreements, Regulations 1983/83 and 1984/83, expressly state that they do not preclude the application of Article 86. Id. at 354. The recent block exemptions in the air transport industry, authorized by Council Regulation 3976/87, 1987 O.J. (L 374) 9, expressly provide that infringement of Article 86 is grounds for denial of categorical exemption. Tetra Pak, [1991] 4 C.M.L.R. at 355. Similarly, the only exemption created directly by the Council, Maritime Transport Regulation, supra note 16, provides that an agreement incompatible with Article 86 will lose its exemption. Tetra Pak, [1991] 4 C.M.L.R. at 355 (A.G. Opinion).
277. Id. at 356.
278. Id. at 356-57.
280. Id. at 389.
281. Id. at 390.
282. See supra note 55.
tionally departing from precedent, even though it is not legally bound by its own precedents. Further, the Court of Justice has ruled that authorities in Member States are subject to its interpretations of specific questions of Community law. In practice national courts yield to the judgments of the ECJ. National courts retain the right, however, to raise the same question repeatedly in subsequent Article 177 references to Community Courts, regardless of past ECJ interpretations.

At this early stage of its development, the extent to which the Court of First Instance will be bound by its own decisions is not clear. What is clear is that, if its judgment is overturned by the Court of Justice, the ECJ's ruling will take precedence, for the Protocol on the Statute of the Court of Justice expressly provides that the CFI is bound by ECJ decisions on points of law.

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283. BROWN & JACOBS, supra note 63, at 278.


287. MILLETT, supra note 172, at 74.
288. ECJ Protocol, supra note 57, art. 54. One commentator suggests that, since “infringement of Community law by the Court of First Instance” is a ground for appeal, and as Community law includes ECJ case law, the CFI is bound by relevant clear and unambiguous ECJ precedents. MILLETT, supra note 172, at 74.
B. Legal Similitude of Block Exemptions

The primary importance of *Tetra Pak* may be its lucid confirmation that, once a dominant firm executes an abusive agreement, any protection afforded by a block exemption will cease, along with the benefits of any other relevant group exemptions. Abusive agreements are illegal in the European Community, whether exempted or not. In view of its broad rationale, *Tetra Pak* will not be limited to patent licenses; courts will surely apply the holding to other subjects exempted under other categorical exemptions.

In considering the potential reach of *Tetra Pak*, it is useful to look at the relationship between a given block exemption and another. First, all derogations from Article 85(1) serve generally the same purpose. The Commission has equated group exemptions and individual exemptions inasmuch as they are “simply a particular form of the declaration of the inapplicability provided for in Article 85(3).”289 This would indicate that, despite their diverse subject matter, block exemptions are not functionally distinct.

More fundamentally, Regulation 19/65 states that certain excepted groups of agreements may be delineated only after the Commission has acquired “sufficient experience” with certain types of agreement to be sure they can fulfill the conditions set down by Article 85(3).290 Consequently, the slowly cultivated exemptions—rooted in the Commission experience of handling literally thousands of notifications over the years and having a common ground of creation—can be expected to possess an equivalent relationship to Article 86. Thus, upon a showing of abusive conduct, sundry block-exemption regulations are not apt to be differentiated—or spared.

Two relatively recent Commission block exemptions have specifically described the mutual interaction of block exemptions. The Research and Development Block Exemption provides that agreements executed in compliance therewith may also enjoy the protection of other block exemptions.291 Even though an agreement may not be eligible for a specific R&D exemption, it may nevertheless find protection in another block exemption.292 Similarly, the Franchising Block Exemption293 provides that an agreement may be concurrently exempted under another block exemption, assuming its has fulfilled the relevant conditions of the latter.294 Thus, the Commission seemingly favors the interchangeability of the exemptions, and has expressly noted that, should an

289. EUROPEAN COMMISSION, SIXTEENTH REPORT ON COMPETITION POLICY 118 (1986) [hereinafter SIXTEENTH REPORT].

290. Regulation 19/65, supra note 85, Recital 4.

291. R&D Block Exemption, supra note 17, Recital 14.


293. Franchising Block Exemption, supra note 13.

294. Id. Recital 17. Undertakings may not, however, “benefit from a combination of the provisions of this Regulation with those of another block exemption Regulation.” Id. (emphasis added).
agreement not fully conform with the details of a group-exemption reg-
ulation, an enterprise may "establish that the conditions of another block
exemption are fulfilled."295

Along similar lines, Judge Kirschner has stated that

despite their differences in points of detail, all block exemptions constitute
an instrument for implementing art. 85(3). . . . It would be contrary to the
system of the Treaty to destroy the uniform application of art. 85 and 86
in the various sectors covered by block-exemption regulations by drawing
artificial distinctions.296

Hence Judge Kirschner has supported the contention that the Patent-
Licensing Block Exemption interacts with Article 86 in the same way as
any other block exemption.297

In practical terms, Tetra Pak warns dominant firms that any agree-
ment formulated under the umbrella of a block exemption will be vul-
nerable if it potentially strengthens the firm's market power. In order to
avoid forfeiture, firms should look to possible safeguards available
under EEC competition law.298

C. The “Positive Side” of EC Competition Law

The Commission has referred to a “whole range of exemptions or dero-
gations” from EEC competition law as the “other face of competition
policy, its positive side.”299 Even after Tetra Pak, a dominant firm still
vulnerable to an allegation of abusive conduct, despite full compliance
with a group exemption, may avail itself of an array of protective
devices. This part of Section V will survey the EEC provisions upon
which undertakings may rely to assure of the permissibility of their
agreements.

1. Agreements Exempt Ab Initio from EEC Competition Law

A dominant firm may rely on certain Treaty provisions that exempt par-
ticular transactions altogether from EEC competition law.300 For exam-
ple, Articles 85 and 86 apply to EC agricultural products only as
determined by the Council, following the Common Agricultural Policy
stated in Article 43 of the Treaty.301 Similarly, Article 223 excludes
application of the competition Articles to the defense industry, certain
national-security items being expressly designated for exclusion by the

295. SIXTEENTH REPORT, supra note 289, at 118 (emphasis added).
297. Id.
298. See infra notes 299-382 and accompanying text.
299. EUROPEAN COMMISSION, EIGHTEENTH REPORT ON COMPETITION POLICY, Intro-
duction (1988) [hereinafter EIGHTEENTH REPORT].
300. See EEC TREATY arts. 59, 42, 43 (limiting application of competition rules to
agriculture sector); id. art. 84 (special rules for transport); id. art. 223(1)(b) (exclud-
ing defense items from competition rules); id. art. 232(1) (exempting ECSC Treaty
provisions from Treaty of Rome provisions); id. art. 232(2) (providing that Treaty of
Rome shall not derogate from EURATOM Treaty).
301. EEC TREATY arts. 42 & 43.
Moreover, Article 232 of the Treaty of Rome expressly excludes agreements subject to the rules of the European Coal and Steel Community from the legislative jurisdiction of the EEC Treaty, including Articles 85 and 86.\textsuperscript{303} The Treaty also makes special provisions for various aspects of transportation.\textsuperscript{304}

2. \textit{De Minimis Exemption — Appreciable Effect}

The Court of Justice has determined that Common Market competition law will not reach an agreement, even one jeopardizing Community principles of competition, unless it “affect[s] trade between Member States and [has] the object or effect of interfering with competition within the Common Market.”\textsuperscript{305} Several ECJ judgments have similarly fashioned a \textit{de minimis} principle limiting application of Article 85(1).\textsuperscript{306} Although the Commission’s Notice on Agreements of Minor Importance\textsuperscript{307} is binding neither on the Court of First Instance nor on municipal tribunals, it has offered guidance in evaluating the “appreciable effects” of agreements.\textsuperscript{308} The Commission states that minor agreements need not be notified to the Commission at all, although they may be.\textsuperscript{309} The financial criteria demand that an enterprise’s share of the relevant market shall not exceed five percent, and the aggregate “turnover” of all the firms party to the agreement shall not exceed 200 million Ecu ($168 million).\textsuperscript{310} The Commission apparently credits equal weight to market share and turnover.\textsuperscript{311} The Commission states, however, that its quantitative definition of “appreciable” is not absolute, for agree-

\textsuperscript{302} Id. art. 223(1)(b).
\textsuperscript{303} Id. art. 252(1). There are analogous articles addressing the matter of competition under the ECSC Treaty. \textit{See} E.C.S.C. Treaty arts. 65 & art. 66.
\textsuperscript{304} \textit{See} EEC \textit{Treaty} arts. 3, 4, 5, 74-84.
\textsuperscript{306} \textit{See}, e.g., Case 5/69, Franz Völk v. Etablissements J. Vervaeke, 1969 E.C.R. 295, 1969 C.M.L.R. 273 (0.2% - 0.5% market share in Germany not caught by Article 85(1), due to insignificant effect and weak position in the market); Case 258/78, L.C. Nungesser KG v. Commission, 1982 E.C.R. 295, [1983] 1 C.M.L.R. 278 (to fall within ambit of Article 85(1) clause must show appreciable restrictions on competition and appreciable effect on trade); Joined Cases 19 & 20/74, Kali und Salz AG v. Commission, 1975 E.C.R. 499, [1975] 2 C.M.L.R. 528 (2.5% of potash market does not have noticeable effect).
\textsuperscript{307} Notice of 3 Sept. 1986 on Agreements of Minor Importance, 1986 O.J. (C 281) 2 [hereinafter Notice on Agreements of Minor Importance].
\textsuperscript{309} Notice on Agreements of Minor Importance, \textit{supra} note 307, at 2.
\textsuperscript{310} \textit{Id.} at 2-3.
\textsuperscript{311} Gleiss, \textit{supra} note 75, at 92.
ments between larger undertakings may have only negligible effect within the Common Market.\textsuperscript{312} Thus the determination of whether an agreement is of minor importance is made on a case-by-case basis. Situations in which the \textit{de minimis} exception will apply to a market-dominant firm are rare, however, because an undertaking with less than 5 percent of the market will almost never hold a dominant position.

3. \textit{Notification and Application to the EC Commission}

Regulation 17 requires a firm doing business in the EC to make a formal \textit{application} to the Commission whenever it seeks negative clearance for a proposed agreement under Article 85(1) or 86,\textsuperscript{313} or to make a formal \textit{notification} when the firm desires an individual exemption under Article 85(3).\textsuperscript{314} Although there are no sanctions for \textit{not} notifying an agreement, an undertaking will shield itself from fines, should certain clauses be found unlawful, from the date of notification through the date of the Commission Decision granting or denying exemption.\textsuperscript{315} (There is, however, no comparable immunization from fines upon application for negative clearance.) Additionally, an important advantage to notification is that an individual exemption may be granted retroactively to a date no earlier than the date of notification.\textsuperscript{316}

The Court of Justice has made it clear that use of the official Form A/B is mandatory,\textsuperscript{317} and providing all information is a prerequisite to a valid notification.\textsuperscript{318} Furthermore, the Commission has refused to give effect to notifications that inaccurately report an agreement and has assessed fines accordingly.\textsuperscript{319} Regulation 17 exempts certain agreements, however, from the notification requirement. Specifically exempted are agreements made by parties from a single Member State.

\textsuperscript{312} Notice on Agreements of Minor Importance, \textit{supra} note 307, at 2. The Commission may impose fines should the undertakings negligently miscalculate their aggregate market share or turnover. \textit{Id.}

\textsuperscript{313} Regulation 17, \textit{supra} note 34, art. 2.

\textsuperscript{314} \textit{Id.} art. 4(1).

\textsuperscript{315} \textit{Id.} art. 15(5).

\textsuperscript{316} \textit{Id.} art. 6(1).


\textsuperscript{319} \textit{See}, e.g., Commission Decision 82/287 of 6 January 1982 Relating to a Proceeding under Article 85 of the EEC Treaty (AEG-Telefunken), 1982 O.J. (L 117) 15; Commission Decision 90/645 of 28 November 1990 Relating to a Proceeding under Article 85 of the EEC Treaty (Bayer Dental), 1990 O.J. (L 351) 46 (individual exemption could not be granted when general conditions of sale and delivery were not notified to the Commission).
and involving no imports or exports between Member States,\textsuperscript{320} certain two-party agreements regarding resale prices,\textsuperscript{321} and certain agreements whose "sole object" is the development of standards and types of joint R\&D\textsuperscript{322} or specialization in the manufacture of products.\textsuperscript{323}

4. **Negative Clearance**

Under Regulation 17, any enterprise that anticipates effecting an agreement in the European Community may both notify it to the Commission and seek "negative clearance,"\textsuperscript{324} a procedure resulting in an official statement that an undertaking need not apply for exemption because Article 85(1) does not apply to its agreement, decision, or concerted practice. The Commission rarely issues negative clearance when, in its opinion, there is no reasonable expectation that an agreement will violate Article 85(1).\textsuperscript{325}

A firm should consider applying for negative clearance whenever an agreement potentially infringes either Article 85 or 86.\textsuperscript{326} Even though there is no possibility of obtaining exemption from the restrictions of Article 86, a favorable response from the Commission will yield a formal Decision that the agreement provides no ground for an Article 86 action before a national court or upon a competitor's application to the Commission.

The negative-clearance procedure has disadvantages, however. First, as the Advocate General conceded in Tetra Pak, a national court, while protecting individual rights directly conferred by the Treaty, may not be bound by a Commission Decision granting negative clearance.\textsuperscript{327} The Court of First Instance has also questioned the legal import of negative clearance in national courts.\textsuperscript{328} Thus, negative clearance may not deter a competitor from bringing an action under Article 85 or 86 in a national court.

Because a national court remains competent to apply Articles 85(1) and 86 only until the Commission has initiated a negative clearance procedure,\textsuperscript{329} it may be advantageous for a firm contemplating doing business in the EC to seek both individual exemption and negative clearance.\textsuperscript{330} Then a municipal tribunal will be required to adjourn a

\begin{itemize}
  \item \textsuperscript{320} Regulation 17, \textit{supra} note 34, art. 4(2)(1).
  \item \textsuperscript{321} \textit{Id.} art. 4(2)(2)(a).
  \item \textsuperscript{322} \textit{Id.} art. 4(3)(a)-(b).
  \item \textsuperscript{323} \textit{Id.} art. 4(3)(c).
  \item \textsuperscript{324} \textit{Id.} art. 2.
  \item \textsuperscript{325} KERSE, \textit{supra} note 197, at 357.
  \item \textsuperscript{326} \textit{See} Regulation 17, \textit{supra} note 34, art. 2.
  \item \textsuperscript{327} Tetra Pak, [1991] 4 C.M.L.R. at 375-76 (A.G. Opinion).
  \item \textsuperscript{328} \textit{Id.}
  \item \textsuperscript{329} "As long as the Commission has not initiated a procedure under [Regulation 17, art. 2, for negative clearance upon application by an undertaking], the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86. . . ." Regulation 17, \textit{supra} note 34, art. 9(3).
\end{itemize}
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competition case, at least until such time as the Commission decides whether to grant a negative clearance.

Second, the Commission is not required to verify a firm's compliance with Article 86, and usually it will grant negative clearance only in "clear cases." Moreover, negative clearance will not prevent the imposition of a fine for infringement in the time period between application and denial of negative clearance. Thus, if possible, a firm should apply for an individual exemption at the same time in order to shield itself from fines.

5. Compliance with Block Exemption

Conceivably, an undertaking may hope to comply with the requirements of a block-exemption regulation, tailoring its agreement to the "white list" of allowable clauses. In practice, however, agreements rarely qualify fully and unquestionably for a given block exemption. Therefore, a national court may still question the degree of compliance with the white list even though block-exemption regulations bind authorities in Member States. Consequently, in spite of its efforts to comply, a firm may find itself defending its qualification for block exemption in a national court.

Since block exemptions derive from a "general, abstract assessment \ldots ex ante," Judge Kirschner reasoned in his Tetra Pak Opinion that "the effect of block exemption is weaker than that of individual exemption" because the Commission does not investigate an agreement to measure it against the conditions of Article 85(3). He thus cautioned that block exemption is not equivalent to "tacit negative clearance." Tetra Pak confirmed, furthermore, that block exemption will never prevent a municipal court from assessing an allegation of abuse of dominant position under Article 86.

Conversely, Judge Kirschner indicated that block exemption is "stronger" than individual exemption, which is not subject to "retroactive withdrawal." "Block exemption is based directly on legislation and not, as in the case of an individual exemption, on an administrative decision" by the Commission.

The major advantage of a block exemption for a firm doing business in the EC is the avoidance of costly application and notification proce-

332. See 2 HAWK, supra note 52, at 2 n.3.
333. Whaite, supra note 330, at 88. "The first decision is whether to modify the commercial proposals to fit the straitjacket." Id.
334. KERSE, supra note 197, at 68.
336. Id. at 355.
337. Id. at 356.
338. Id.
339. Id. at 376.
340. Id. at 356-57.
dures. The Director General of DG IV has stated that the “sheer mass of agreements notified to us for exemption and chronic staff shortages” have resulted in a state of affairs in which individual exemptions can no longer provide legal certainty.\textsuperscript{341} As a result, a firm will profit from using a block exemption to avoid the bureaucratic delays accompanying either negative clearance or individual exemption.

The disadvantages of block exemptions include the restriction that an agreement must be between two parties and not more,\textsuperscript{342} and the Commission’s power to withdraw exemption whenever it determines that the effects of a transaction fail to meet the conditions set down in Article 85(3).\textsuperscript{343} Furthermore, \textit{Tetra Pak} confirms that a block exemption will not shield a powerful firm’s agreement should the Commission detect any abuse of dominant position.

Finally, as a result of lobbying and other political exigencies of the Member States, the particular components enunciated by block-exemption regulations tend to reflect only the most common and typical clauses across the entire spectrum of all types of businesses in all European States.\textsuperscript{344} Consequently, the clauses appearing on a regulation white list may simply not fit a firm’s business needs, and if an unapproved provision is necessary for a contract, an enterprise will need to take further actions to protect itself either by means of individual exemption or negative clearance.

6. \textit{“Opposition Procedure” — Accelerated Exemption}

A hybrid form of exemption, known as the “opposition procedure,” has been created through provisions within certain block-exemption regulations, including the Patent-Licensing Exemption.\textsuperscript{345} DG IV initiated the

\begin{itemize}
\item \textsuperscript{341} Manfred Caspari, \textit{EEC Enforcement Policy and Practice: An Official View}, 54 \textit{Antitrust L.J.}, 599, 601 (1985). The Director General reported in 1985, for example, that the adoption in 1967 of a regulation governing exclusive-distribution block exemption alone had cleared a backlog of 31,000 notified agreements, and the Exclusive Purchasing Block Exemption “should clarify the status” of 100,000 agreements. \textit{Id.} at 604.

More recent figures show a substantial backlog of competition cases. In 1988 the Commission issued only twenty-five formal Decisions, including one rejection of a complaint, ten individual exemptions, one negative clearance, seven “prohibitions” under Article 85 and six more under Article 86. During the same year 36 comfort letters were issued and 419 cases were settled without formal letters. \textit{Eighteenth Report}, \textit{supra} note 299, at 45. Further, in 1988 firms submitted 376 new applications and notifications, adding to a sum of 2909 outstanding applications and notifications. Altogether 3451 cases were pending before the Commission at the close of 1988. \textit{Id.} at 46.

\item \textsuperscript{342} See, e.g., Patent-Licensing Block Exemption, \textit{supra} note 4, art. 1.

\item \textsuperscript{343} See \textit{id.} art. 9.

\item \textsuperscript{344} Victor, \textit{supra} note 331, at 645.

\item \textsuperscript{345} The Patent-Licensing Block Exemption, \textit{supra} note 4, was the first to provide for the “opposition procedure.” The procedure has been incorporated into more recent block exemptions, including R&D Block Exemption, \textit{supra} note 17; Specialization Block Exemption, \textit{supra} note 15; Know-how-Licensing Block Exemption, \textit{supra} note 12; Franchising Block Exemption, \textit{supra} note 13. There are analogous procedures in the Maritime Transport Regulation, \textit{supra} note 16.
\end{itemize}
procedure in order to expedite individual exemptions and negative clearances. The Commission also hopes the procedure will offer EC firms greater legal certainty, and John E. Ferry, a director of DG IV, describes it as a "mechanism . . . for a potentially quick decision on borderline cases."

Procedurally, an undertaking wishing to enter an agreement containing clauses restrictive of competition—but appearing neither on the black list nor the white list—must notify the Commission. If within six months the Commission has voiced no opposition, the provision becomes exempt by default. Such exemption is probably valid at least until the block-exemption regulation expires.

If, on the other hand, the Commission asserts its opposition within the six-month period, the agreement becomes subject to Regulation 17, and the notifying party may apply for formal negative clearance. The Commission may withdraw its opposition at any time unless a Member State intervenes. Should an undertaking persuade the Commission that its agreement complies with the conditions of Article 85(3), its exemption will be retroactively effective from the date of its first notification.

If the Commission fails to respond to a notification, third parties will not be notified, and the Commission’s non-action may be neither binding on third parties nor enforceable in national courts. Unfortunately, parties will remain in doubt as to whether an agreement could indeed achieve exemption, and, once again, the question may be

346. VALENTINE KORAH, PATENT LICENSING AND EEC COMPETITION RULES: REGULATION 2349/84, 95 (1985) [hereinafter PATENT LICENSING].
348. See Patent-Licensing Block Exemption, supra note 4, art. 4(1); R&D Block Exemption, supra note 17, art. 7(1); Specialization Block Exemption, supra note 15, art. 4(1); Know-how-Licensing Block Exemption, supra note 12, art. 4(1); Franchising Block Exemption, supra note 13, art. 4(1). There are analogous procedures in the Maritime Transport Regulation, supra note 16, art. 12(1-3).
349. KORAH, PATENT LICENSING, supra note 346, at 95. Typically, a block exemption lasts 10 years. The present Patent-Licensing Block Exemption, for example, expires on Dec. 31, 1994.
350. See Patent-Licensing Block Exemption, supra note 4, art. 4(5); R&D Block Exemption, supra note 17, art. 7; Specialization Block Exemption, supra note 15, art. 4(1)-(2); Know-how-Licensing Block Exemption, supra note 12, art. 4; Franchising Block Exemption, supra note 13, art. 6. See also Maritime Transport Regulation, supra note 16, art. 12(3).
351. See Regulation 17, supra note 34, art. 2.
352. See Patent-Licensing Block Exemption, supra note 4, art. 4(6); R&D Block Exemption, supra note 17, art. 7(6); Specialization Block Exemption, supra note 15, art. 4(6); Know-how-Licensing Block Exemption, supra note 12, art. 4(7); Franchising Block Exemption, supra note 13, art. 6(6).
353. KERSE, supra note 197, at 69.
resolved ultimately in a national court. Moreover, so long as the notified agreement floats in limbo between notification and exemption (or non-opposition), it may remain unenforceable in court and subject to automatic nullification under Article 85(2).

A notification under the opposition procedure, devised as it is under the aegis of a block-exemption regulation, does not terminate the competence of national courts, unlike a notification for negative clearance pursuant to Regulation 17, article 9(3), which does. Further, such non-opposition from the Commission would not likely be appealable to the Court of First Instance because the ECJ has held that only a measure "definitively laying down the position of the Commission or the Council" is an act appealable to the Court of Justice.

An undertaking may use the opposition procedure when no part of an agreement is on the black list of the pertinent block exemption, and it should do so when there are nevertheless clauses that do not appear on the white list of unquestionably valid clauses. A favorable response from the Commission, that is, no opposition to an agreement within the six-month limit, will enable the firm to avoid the tedious route of individual exemption or negative clearance, as well as the need to rewrite its contract to conform with the exact contours of the block exemption. In other words, the firm may rely on its grey clauses as having been deemed exempt. At the very least, any fines levied by the Commission will not apply from the date of notification.

A drawback to the opposition procedure is that block exemptions may include ceilings limiting the size or annual turnover of the firm and its trading partner. This may be one reason why, in practice, undertakings have not used the opposition procedure frequently. One practitioner contends, furthermore, that firms fear "an early and over-cautious" decision regarding exemption and hope that "an ordinary notification will gather dust in a corner for the effective life of the agreement." Finally, "[u]nimportant agreements may well slip through the opposition procedure and save the parties from the need to distort

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355. KORAH, PATENT LICENSING, supra note 346, at 98.
356. KERSE, supra note 197, at 73. "It is necessary therefore to ascertain whether an agreement notified under the opposition procedure has the benefit of exemption immediately but subject to the possibility of opposition, or at the end of the six-month period and then with or without retrospective effect. The bloc [sic] exemption regulations are silent on this except for the provision which says that where the opposition is withdrawn . . . the exemption applies from the date of notification." Id.
357. KORAH, PATENT LICENSING, supra note 346, at 99-100.
359. See Regulation 17, supra note 34, art. 15(5).
360. See R&D Block Exemption, supra note 17, art. 3(3), which disqualifies undertakings with a market share in excess of 20%. See also Specialization Block Exemption, supra note 15, art. 3(1), which mandates ceilings of 20% market share and annual turnover of 500 million Ecu. Id. See supra note 200.
361. Whaite, supra note 330, at 88.
362. Id.
their agreements to bring them within the ambit" of the block exemption.\textsuperscript{363}

Despite its shortcomings, the opposition procedure is expected to become standard in EC competition law,\textsuperscript{364} and it may provide a useful middle ground between block exemption and individual exemption.

7. Formal Individual Exemption

As provided in Article 85(3), an agreement that restricts or distorts competition in violation of Article 85(1) is eligible for individual exemption if it stays within the contours of Article 85(3)(a) and (b), that is, "contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom."\textsuperscript{365} Unlike the Commission's categorical exemptions, which tender an automatic exemption and require no communication with the Commission, individual exemptions are granted only when an undertaking notifies its agreement to the Commission.\textsuperscript{366}

The Advocate General confirmed in \textit{Tetra Pak} that, once DG IV has granted an individual exemption, an agreement is no longer susceptible to allegations of infringement of Article 85(1) in municipal courts because national authorities "may not circumvent the \textit{erga omnes} effect of the decision."\textsuperscript{367} Consequently, individual exemption may afford an undertaking relative security that its agreement is legal. Moreover, a dominant firm need not fear that its agreement will later be deemed "abusive" because, once the agreement is notified, the Commission will have studied it for infringements of both Article 85 and 86. Most likely, a large firm will need to use the individual exemption procedure if (a) its market share and turnover exceed the ceilings provided by a block-exemption opposition procedure, or (b) it cannot conform its agreement to the legal limits of the block-exemption regulation.

On the negative side, "individual exemption . . . can involve, in the words of the Commission itself, 'considerable bother and expense.' Some [practitioners in the EC] may regard this as something of an understatement."\textsuperscript{368} The Commission can grant only a small number of individual exemptions each year, and, according to the Director General of DG IV, "[p]riority is given in selecting the cases to bring forward for decision to those which are of real importance for the European Community."\textsuperscript{369}

Experience shows that the Commission tends to measure agreements that have been notified for individual exemption against the

\textsuperscript{363} Korah, Patent Licensing, supra note 346, at 95-96.
\textsuperscript{364} Venit, supra note 354, at 168.
\textsuperscript{365} EEC Treaty art. 85(3)(a) & (b).
\textsuperscript{366} Regulation 17, supra note 34, art. 4(1).
\textsuperscript{368} Victor, supra note 331, at 646.
\textsuperscript{369} Caspari, supra note 341, at 603.
model clauses in black and white lists of block exemptions. Thus, an agreement under consideration for approval may be rejected by the Commission if it appears on the black list even though the rationale for blacklisting a contract provision is not applicable. If future decisions run on this tack, the specific examples listed in block-exemption regulations could offer a standard for all exemptions, making case-by-case consideration of agreements unnecessary.

8. Administrative Letters ("Comfort Letters")

Another possible outcome of an exchange with DG IV is that it will simply close an undertaking's file, granting neither formal exemption nor negative clearance. A large percentage of cases before the Commission are resolved not by formal Decision but by informal resolution, such as a voluntary withdrawal of an application or a voluntary relinquishment of an agreement that has raised the hackles of the Commission. Often in these cases, the authorities will state in an administrative letter, commonly called a "comfort letter," that the Commission is not moved to issue a Statement of Objections or initiate any proceedings.

Although comfort letters are not legally binding on municipal courts, a comfort letter may nevertheless advance a party's cause before a national tribunal, which is likely to find the Commission's conclusion persuasive. Paradoxically, this may present a difficulty: a letter from the Commission stating that an agreement should qualify for exemption will imply that the clause in question infringes Article 85(1). Thus, the undertaking may inadvertently find itself in the unpleasant situation of receiving the Commission's opinion that an agreement infringes the Treaty without receiving any valid exemption.

372. 2 HAWK, supra note 52, at 19.
373. Venit, supra note 354, at 170. This may also be referred to as "light" negative clearance. See id. at 169.
Originally, comfort letters were aimed only at applications for negative clearance, but since 1983 they have been used in order to "open the way for a more flexible administrative practice in assessing notifications" for individual exemption. By demanding that the Commission "publish a summary of the relevant application or notification and invite all interested third parties to submit their observations" before making a decision regarding Article 85(3) exemption, Regulation 17 has given rise to a more formal type of comfort letter. Firms doing business in the EC may increasingly rely on comfort letters in light of Commission efforts to provide undertakings with a growing measure of legal certainty. After such publication, the Commission may simply close an undertaking's file.

This more formal approach is less commonly used than the informal letter. Now the Commission may publish in the Official Journal of the Community its determination that an agreement caught by Article 85(1) should nevertheless be exempted, inviting comments by interested parties. Along with details of the notified agreement, the Commission may announce its intention to close its file on the matter. The purpose of this publication is to enhance the value of the comfort letter without giving up the Commission's power to intervene to void an agreement by means of Decision.

Although formal letters do not constitute formal individual exemptions, they may carry some weight in a later court action, especially when a party opponent raised no prior objection to the exemption when it was published in the Official Journal. Despite the enhanced status of comfort letters within the Community, these administrative letters do not enjoy the status of a Commission Decision, and they are not appealable to the Court of First Instance.

Conclusion

_Tetra Pak_ is a landmark case not because the judgment was surprising but because it filled a gap in EC law. The European Court's full consideration focused on the single question, "whether Article 86 can be applied where exemption has been granted under Article 85(3)." Relying on past judgments of the Court of Justice, the Advocate General convincingly demonstrated that Articles 85 and 86 are concurrently applicable. Nevertheless, Tetra Pak's application to the Court to

378. Regulation 17, supra note 34, art. 19(3).
379. See EUROPEAN COMMISSION, TWELFTH REPORT ON COMPETITION POLICY 37 (1983).
381. Venit, supra note 354, at 170.
382. Whaite, supra note 330, at 89.
384. Id. at 346-47 (A.G. Opinion).
overturn the Commission's interdiction of the exclusive patent license agreement was not frivolous, for the issue had not previously been expressly determined by EC Courts.\textsuperscript{385}

*Tetra Pak* provided the Advocate General the opportunity to expound on the legal similarities of block-exemption regulations,\textsuperscript{386} which, with DG IV's increasing experience gathered from a growing backlog of notifications, will likely generate future categorical exemptions. As a result, it is clear that the Court has not confined the *Tetra Pak* ruling to the area of patent licensing, and that the decision will apply to any and all block exemptions promulgated by the Commission.\textsuperscript{387} In short, block exemption protection will not shield agreements that facilitate abuse of dominant position in the Common Market.

Even a firm with considerable market power may rely upon the "positive side" of EC competition law, however, making use of the derogations allowed from the commands of the competition Articles of the Treaty of Rome. When an agreement, decision, or concerted practice potentially violates Article 85(1), a firm may take advantage of negative clearance\textsuperscript{388} or individual exemption\textsuperscript{389} as provided for in Regulation 17,\textsuperscript{390} or it may seek a "comfort letter" from the Commission.\textsuperscript{391} If a contract falls within the subject matter of a block exemption, a firm can try to match its agreement to the white list of the block-exemption regulation,\textsuperscript{392} or, alternatively, it may seek approval of its grey clauses through the opposition procedure.\textsuperscript{393}

When a firm's activity may infringe Article 86, negative clearance and comfort letters may afford some protection,\textsuperscript{394} but the Commission expects market-dominant firms to conduct their business without distorting competition.\textsuperscript{395} This recondite duty to *avoid distortion of competition*, along with the somewhat obscure "objective" test for abuse, may frustrate large firms that seek to avoid the scrutiny of the Commission. Further, as *Tetra Pak* shows, a firm may back into an infringement of Article 86 without being fully aware of it.\textsuperscript{396} The responsibility to comport with EC admonitions against "abusive" behavior is amplified in the wake of *Tetra Pak*: since the Court fears the destruction of the uniform application of the competition-law Articles of the Treaty "by drawing artificial distinctions"\textsuperscript{397} among the block exemptions, an abusive

\begin{itemize}
\item \textsuperscript{385} *Id.* at 383.
\item \textsuperscript{386} See *supra* notes 296-97 and accompanying text.
\item \textsuperscript{387} See *supra* notes 289-95 and accompanying text.
\item \textsuperscript{388} See *supra* notes 324-32 and accompanying text.
\item \textsuperscript{389} See *supra* notes 365-71 and accompanying text.
\item \textsuperscript{390} See Regulation 17, *supra* note 34, arts. 2, 4.
\item \textsuperscript{391} See *supra* notes 372-82 and accompanying text.
\item \textsuperscript{392} See *supra* notes 333-44 and accompanying text.
\item \textsuperscript{393} See *supra* notes 345-64 and accompanying text.
\item \textsuperscript{394} See *supra* notes 324-32, 372-79 and accompanying text.
\item \textsuperscript{395} See *supra* notes 153-55 and accompanying text.
\item \textsuperscript{396} See *supra* notes 156-60 and accompanying text.
\item \textsuperscript{397} *Tetra Pak*, [1991] 4 C.M.L.R. at 355-56 (A.G. Opinion).
\end{itemize}
arrangement can lead to the immediate loss of all applicable block exemption protections.

Moreover, the Court has conceded that "the other party to the agreement with the undertaking in the dominant position does not necessarily know about its dominance of the market and hence about the possible application of Article 86."398 In other words, the dominant firm's trading partner may be surprised—as was BTG—to find a mutually satisfactory agreement nullified by the EC Commission. Further, EC authorities will not hesitate to exercise their jurisdiction over non-EC firms whenever the effects of an agreement are felt within the Common Market.399

Finally, Tetra Pak indicates that certain anticompetitive agreements countenanced by the Commission on account of their beneficial effects within the EC400 may be constrained whenever they abrade the principles and purposes of the Treaty.401 Even agreements sanctioned by national intellectual property laws may not survive when they breach Article 3(f)'s absolute demand that an undertaking shall not distort competition within the Common Market.402 Tetra Pak thus also stands for the proposition that the tensions between legal but private monopolies and Community law will be resolved in favor of the precepts of the Treaty of Rome. Even an agreement sanctioned as promotive of technical progress and the commonweal will founder when it distorts competition within the European Community.

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