OPINION OF MR KIRSCHNER JUDGE IN THE COURT OF FIRST INSTANCE delivered on 21 February 1990 *

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Mr President,
Members of the Court,

1. Under Article 2 of Council Decision (88/591/ECSC, EEC, Euratom) of 24 October 1988,[1] a member of the Court of First Instance who is called upon to perform the task of an Advocate General has the duty, acting with complete impartiality and independence, to make, in open court, reasoned submissions in order to assist the Court of First Instance in the performance of its task. The honour of delivering the first Opinion to our court has fallen to me. I shall strive to perform this duty impartially and conscientiously in order to assist the full

* Original language: German.

1 — OJ 1988 L 319, p. 1; corrected version in OJ 1989 C 215, p. 1.

Court of First Instance in reaching its first decision. In view of the importance of the case in question I have decided to deliver my Opinion, not in the form of a written submission, but orally at this sitting.

A — The facts

Since the Court of First Instance is acquainted with the facts I shall rehearse only the most important factual aspects in so far as they facilitate understanding of the case or may help the Court to reach its decision.

2. The applicant, Tetra Pak Rausing SA, coordinates from Switzerland the activities of the Tetra Pak group of companies. Tetra produces and distributes cartons and filling machines for the packing of liquid foods, a sector in which it is a world leader. This is true particularly of the aseptic packaging of liquids, above all UHT-treated milk, since Tetra was one of the first companies to develop such technology and to supply the relevant equipment and packaging materials.

3. In 1985 Tetra had 91.8% of the European Community market in aseptic filling machines and 89.1% of the market in the relevant cartons. The Commission found that, by acquiring the exclusivity of a patent licence for an alternative process for the sterilization of cartons, Tetra had impeded the entry of new competitors onto the market for machines and materials for the aseptic packaging of milk and thereby infringed Article 86 of the EEC Treaty.[2] Tetra considers that claim to be unfounded on the ground that patent licences are among the agreements granted exemption by Regulation (EEC) No 2349/84.[3] In order to clarify the significance of the acquisition by Tetra of the relevant licence, it is appropriate to start by calling to mind the technical characteristics of the relevant markets.

4. When milk is UHT-treated it is briefly heated to approximately 140oC, which kills the bacteria. The milk is then immediately filled by machine under strictly aseptic conditions into cartons which the machine has previously sterilized. Milk treated in that way has a shelf-life of several months and yet, unlike in conventional sterilization techniques, its taste is not affected to a significant degree. However, if aseptic conditions are not fully maintained during the packaging operation, the product may become spoilt and dangerous to health.

5. There are considerable technical barriers to access to the market for aseptic packaging machines. Admittedly the basic sterilization method employed by Tetra is no longer protected by patents, but extensive know-how and great experience are needed in order to manufacture machines which guarantee the necessary aseptic conditions. The manufacture of the packaging material is less difficult technically, yet as a rule the sale of the cartons is linked to the sale of the machinery. Consequently, the key to access to the market in such cartons lies in the ability to supply the relevant filling machines as well.

2 — Hereinafter all articles cited without any reference to the relevant treaty are articles of the EEC Treaty.

3 — Regulation No 2349/84 (OJ 1984 L 219, p. 15).

6. UHT-milk is sold mostly in brick-shaped cartons. The commercially available filling machines use concentrated hydrogen peroxide to sterilize the cartons. Heat is used to dry the cartons of hydrogen peroxide residue and maintain aseptic conditions.

Under the filling system developed by Tetra the packaging material is supplied in rolls and sterilized while still flat. Only when the cartons are filled with milk are they formed and sealed on all sides. In contrast, the only other system commercially available in the Community, which was developed by PKL, a subsidiary of the Rheinmetall company, uses preformed blanks. This suffers from the disadvantage, compared with the process developed by Tetra, that the hydrogen peroxide dries less easily in preformed cartons than it does on a flat surface and, as a result, there is greater danger of hydrogen peroxide residues being left.

7. Those difficulties are reduced by the sterilization process developed in the United Kingdom with the licence for which this case is concerned. It uses ultra-violet light to enhance the effectiveness of the hydrogen peroxide, with the result that a weak solution of hydrogen peroxide suffices for the purposes of sterilization. Patents (due to expire in the year 2000) for the process have been granted in Ireland, Spain, Belgium and a number of non-member countries, for instance, the USA, Canada and Japan. A patent application has been filed in Italy and, under the European Patent Convention, for the United Kingdom, France, the Federal Republic of Germany and the Netherlands, and patent applications have also been made in Austria, Switzerland and Sweden. The initial owner of the patent was the British National Research and Development Council (NRDC). With effect from 27 August 1981 the NRDC granted a licence covering the patents and the relevant know-how to Novus Corp., part of the American Liquipak group of companies. The licence was expressed to be exclusive until 27 August 1988 with the possibility of extension, provided that any extension did not infringe Article 85. The licensing agreement was exempt under block-exemption Regulation No 2349/84 from the prohibition set out in Article 85(1) following the entry into force of that regulation in 1985.

8. Liquipak specializes in the manufacture of filling equipment for liquid food products. Even before it acquired the licence, Liquipak was a successful producer of machines for filling cartons with fresh (pasteurized) milk. Whilst that equipment also has to meet strict requirements in point of cleanliness, unlike machines for the packing of UHT-treated milk it does not have to guarantee completely aseptic conditions.

9. In the state of technology obtaining at that time, most fresh milk was sold in 'gable-top' cartons, which, unlike the brick-shaped cartons used by Tetra, can easily be opened without the assistance of any implement. After it acquired the licence, Liquipak began to use it to develop a machine for filling gable-top cartons under aseptic conditions. However, it was not capable, on the strength of its experience of packaging fresh milk, of immediately producing a technically satisfactory, aseptic

packaging machine. Liquipak worked for several years on such a machine. It has obtained patents both for the machines developed and for the cartons.

10. In developing those machines Liquipak collaborated with the Elopak Group from Norway. Elopak manufactures and sells cartons for use in food packaging and distributes filling systems. Its chief activity is related to the packaging of fresh milk in gable-top cartons. Its main competitor is Tetra, whose market share in the sector of filling equipment and cartons for fresh milk is around 50%.

Elopak was Liquipak's exclusive distributor in the EEC, namely for filling machines for fresh milk and for any machines to be developed for the filling under aseptic conditions of UHT-treated milk. Elopak supported Liquipak in particular by installing on a trial basis at various dairies the aseptic packaging machine developed by Liquipak and by providing the necessary cartons free or at a reduced charge. Elopak considers that as early as 1986 those efforts had resulted in a machine which was ready for commercial distribution. That claim is contested by the applicant.

11. In 1986 Tetra acquired the Liquipak Group and with it the exclusive licence at issue in these proceedings. The British Technology Group, as successor to the original licensor, the National Research and Development Council, raised no objections to the transfer of the licence to Tetra.

When Tetra's take-over of Liquipak was announced, Elopak discontinued its support for the trials of the newly developed machine and made an application to the Commission for a finding that Tetra had infringed Articles 85 and 86 of the EEC Treaty.

12. After communication of the statement of objections by the Commission in March 1987 and the hearing on 25 July 1987, Tetra abandoned all claims to the exclusivity of the licence. Although in the Commission's view this meant that the infringement of the competition rules was terminated, the Commission decided that it was necessary to conclude the proceedings by a decision, above all in order to clarify the legal position. However, in view of the relatively novel nature of the case, the Commission did not impose a fine.

13. Consequently on 26 July 1988 the Commission issued the contested decision,[4] the key first article of which reads as follows:

'The acquisition by or on behalf of Tetra Rausing SA of the exclusivity of the licence between NRDC and Novus Corp. of 27 August 1981 through the purchase of the Liquipak Group in so far as it has effects in the EEC constituted an infringement of Article 86 from the date of acquisition until this exclusivity effectively came to an end.'

The Commission expressly reserved the right to continue its investigations into the applicant's wider commercial behaviour on the markets for milk cartons (both fresh and aseptic) and packaging machines (both fresh

4 — Decision 88/501/EEC (OJ 1988 L 272, p. 27).

and aseptic) in order to determine whether the applicant had committed any further infringement of either Article 85 or Article 86.

In order to avoid repetition I shall not go into the facts on which the Commission based its decision until I consider the legal situation.

14. On 11 November 1988 Tetra brought an application before the Court of Justice against the Commission's decision. Under Article 14 of the Council decision of 24 October 1988, the Court of Justice mandatorily referred the case to the Court of First Instance by order of 15 November 1989 and hence, as must be stated already at this juncture, arguments as to the jurisdiction of the Court of First Instance are superfluous.

The applicant bases its claim for the annulment of the Commission decision on an infringement of Articles 85 and 86. It relies on three arguments as follows: It is inconsistent to hold that behaviour that is permitted under Article 85(3) is prohibited under Article 86. It also argues that this is contrary to the principle of legal certainty and jeopardizes the uniform application of Community law by the Commission and the national courts. The Commission has contested these arguments. For the rest of the parties' written submissions I would refer to the Report for the Hearing in order to avoid the translation departments having to do the work twice. As regards the parties' additional explanations given orally at the hearing, I shall deal with them at the appropriate points in my discussion of the law.

B — The justification of the application

15. Whether the application is justified depends on whether the Commission was right to regard the acquisition by the applicant of the exclusive licence as an abuse within the meaning of Article 86 even though the patent licensing agreement was an exempted agreement under block-exemption Regulation No 2349/84.

The applicant considers that to apply Article 86 to its conduct infringes both Article 86 and Article 85. I shall deal with the three arguments on which it relies in that connection in succession.

I — *Compatibility of the application of Article 86 with exemption*

16. The applicant states in the application that it is inconsistent to hold that Article 86 can be applied in respect of conduct which is expressly exempted under Article 85(3). At the hearing it amplified that argument by saying that, in the light of the judgments in the *Ahmed Saeed* and *Hoffmann-La Roche* cases, the conclusion of an agreement exempted by a regulation governing block exemptions does not in itself constitute an infringement of Article 86. Rather, there must be an additional element in so far as the undertaking occupying a dominant position on the market must have imposed the agreement on the other party. In view of the fact that the ground of the application is unchanged (infringement of Articles 85 and 86) that amplification of an argument is permissible.

17. I shall therefore consider the argument in two parts. First, it appears to me to be necessary to examine the legal arguments in the application from the point of view of whether it is logically inconsistent (and therefore mistaken in law) to apply Article 86 to conduct which is the subject of an exemption. To that end, I shall proceed in three stages: after an initial analysis of the Treaty provisions and the case-law of the Court of Justice, I intend, in a second stage, to consider whether secondary legislation has anything to say about the relationship between an individual exemption and Article 86. I consider such an exercise to be necessary even though the case before this court is concerned with a block exemption and not with an individual exemption. This is because the legal position with regard to individual exemption may also provide indications with regard to the effects of a block exemption; only a comprehensive examination can disclose with any certainty the interaction of Articles 85 and 86. Not until the third stage shall I explore whether secondary legislation can cast any light on the relationship between a block exemption and Article 86 and if so in what respects.

Should it turn out that a block exemption does not prevent the concurrent application of Article 86, then the second question will arise as to whether Article 86 is in any case applicable only where there is an additional element as adverted to by the applicant at the hearing.

(1) *The legal situation*

(a) The Treaty and its interpretation by the Court of Justice

18. I shall begin with the straightforward, but nevertheless necessary, observation that express provision for exemption is made only in the case of the prohibition of agreements, decisions and concerted practices affecting competition within the meaning of Article 85(1) but not in the case of the prohibition of abuses of a dominant provision laid down in Article 86. This accords with the location of the relevant provision in the system of the Treaty, since it is set out in the third paragraph of Article 85 and does not take the place of Article 87 after both Article 85 and Article 86. Yet, that would have been to be expected if the authors of the Treaty had intended any exemption to have effects, not only on the prohibition set out in Article 85(1) of agreements, decisions and concerted practices affecting competition, but also on the prohibition of abuses contained in Article 86. That they did not do so is explained by the differing structure of the elements making up the two provisions.

The prohibition set out in Article 85(1) of agreements, decisions and concerted practices affecting competition applies to all markets and all undertakings. It is cast in such general terms that it covers numerous agreements, decisions and concerted practices which are economically sensible and about which no reservations exist, in view of their favourable effects. Because the prohibition had such a wide scope it was necessary for there to be a correction mechanism, which some writers have compared with the 'rule of reason' in the anti-trust law of the United States of America.

19. The phrase 'rule of reason' prompts me to add a comment concerning recourse to the concepts and arguments of US anti-trust law. Many valuable ideas for the interpretation of Community law can be derived from the discussions going on the other side of the Atlantic and from the solutions found by the American courts. However, prudence must be counselled in transferring concepts and theories from one legal system to the

other. There are substantial differences between the various elements going to make up US law and those going to make up Community law, with the result that not every problem confronting one of the two systems finds a counterpart in the other legal system. This is true *inter alia* of the question whether Article 86 can be applied to conduct which has been exempted under Article 85(3). Accordingly I shall refrain from making comparisons with US law in this Opinion.

20. Let us resume our analysis of Article 85. The prohibition laid down in Article 85(1) of agreements, decisions and concerted practices restricting competition is limited, as is necessary, by Article 85(3). Only from the interaction of the two provisions can it be seen which agreements, decisions and concerted practices are tolerated by Community law and which are not.[5]

Article 86 is completely differently structured. It does not apply to all markets, but only to those markets on which one or more undertakings occupy a dominant position. The prohibition which it lays down is directed only to undertakings in a dominant position and not to other undertakings. That itself sharply reduces the field of application of Article 86 in comparison with Article 85. Furthermore, Article 86 only prohibits conduct in the nature of an abuse. That probably means that the prohibition does not cover conduct which the competition rules of the Communities accept as economically advantageous. Therefore there is no need to limit the field of application of Article 86 by way of a 'rule of reason'.

21. At the hearing the applicant expressed the view that, as in the case of Article 85, the application of Article 86 also had to be examined in two stages. It maintained that according to the judgment in the *United Brands*[6] case it first had to be examined whether there was prima facie an abuse and then whether the abuse was objectively justified. It argued that the Commission adopted that approach in the case of the contested decision. That argument of the applicant disregards the fact that examination of a possibility of exemption for which separate rules are laid down is different from the checking of individual objective factors actually forming part of the constituent elements of the prohibition. It is not possible to read into Article 86 a set of criteria for dispensation.

22. Article 86 further differs from Article 85 in so far as its conditions of application can also be fulfilled by unilateral conduct on the part of a single undertaking. Article 85 does not cover such conduct. Accordingly undertakings not in a dominant position may take such unilateral action without falling foul of the Community's competition law. This shows that, in comparison with other undertakings, an undertaking in a dominant position has to comply with stricter rules and accept more far-reaching restrictions on its freedom of action.

If one were to seek to remove from the scope of Article 86 agreements, decisions and concerted practices which had been exempted under Article 85(3), the

5 — See the judgments in Case 13/61 *Kledingverkoopbedrijf de Geus en Uidenbogerd* v *Robert Bosch GmbH* [1962] ECR 45, at p. 52 and in Joined Cases 209/84 to 213/84 *Ministère public* v *Asjes and Others* [1986] ECR 1425, at p. 1469.

6 — Judgment in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, at p. 298.

remarkable situation would arise that although Article 86 would in the appropriate circumstances prohibit conduct on the part of an undertaking in a dominant position which would be open to smaller undertakings without any limitation imposed by competition law, that undertaking could not be prohibited from acting in a way which, even under normal market conditions, is subjected to control and permitted only under certain circumstances, on account of its danger to competition.

23. The differences described in the structure of the two provisions also make sense from the economic point of view. Article 85 applies to the behaviour of all undertakings under normal conditions of competition and prohibits them from disturbing effective competition through particular types of conduct, namely agreements or concerted practices. For its part, Article 86 protects from further adverse effects competition which has already been weakened as a result of an undertaking or undertakings having a dominant position.[7] Consequently, the idea of authorization for conduct which constitutes an abuse and will decrease the remaining degree of competition still further is scarcely conceivable. Instead, in order to maintain the remaining degree of competition, it is appropriate for there to be action by the cartel authorities which goes beyond the measures which are necessary and permissible in a market in which no undertaking occupies a dominant position.

24. However, the applicant maintains that to apply Article 86 to conduct which has been exempted pursuant to Article 85 conflicts with the judgment of the Court of Justice in the *Continental Can* case[8] according to which Articles 85 and 86 cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim. Against this it must be stated that, according to Article 3(f) of the Treaty, the common aim of both provisions is the institution of a system ensuring that competition in the common market is not distorted. Consequently the two provisions are to be interpreted in such a way that they achieve that objective. It may be sufficient for that purpose for only one provision to be applied.

25. Accordingly, the wording and the context of the competition rules laid down in the Treaty suggest that Article 86 should also be applicable to conduct which, as a result of Article 85(3), is exempted from the prohibition contained in Article 85(1).

26. It also proves correct in relation to other prohibitions set out in the EEC Treaty that exemption pursuant to Article 85(3) is operative solely with respect to the prohibition set out in Article 85(1). This is true, for instance, of agreements, decisions or concerted practices which give rise to discrimination on grounds of nationality. In that case Article 7 precludes exemption.[9] Equally, exemption under Article 85(3) cannot authorize conduct which is contrary to the second sentence of Article 36. Consequently, such conduct could not be adopted despite the exemption granted to the parties concerned.

27. I shall now check this finding, which is based on a consideration of the wording of

7 — Judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, at p. 541.

8 — Judgment in Case 6/72 *Europemballage Corporation and Continental Can Company* v *Commission* [1973] ECR 215, at p. 246, paragraph 25.

9 — The question is contested in the literature: see for example Deringer: *EWG-Wettbewerbsrecht, Kommentar*, paragraph 8 on Article 85(3); *alter* Koch in Grabitz: *Kommentar zum EWG-Vertrag*, paragraph 66 preceding Article 85.

the Treaty, in the light of decided cases of the Court of Justice.

28. As long ago as 20 March 1957 a judgment of the Court of Justice considered the relationship between the prohibition in Article 65 of the ECSC Treaty of agreements, decisions and concerted practices and other prohibitions contained in provisions of that treaty, and specifically with the prohibition of discrimination laid down in Article 4(b). The applicants in that case had applied under Article 65(2) of the ECSC Treaty for approval of the trading rules of one of the selling agencies for Ruhr coal. The High Authority had approved most of the applicants' requests but rejected some of the provisions of the trading rules on the ground that they conflicted both with Article 65(2) and with the prohibition of discrimination contained in Article 4(b) of the ECSC Treaty. The applicants argued that Article 65 ranked as *lex specialis* which precluded the application of Article 4(b) to the same facts. However, the Court of Justice decided, in accordance with the Opinion of Mr Advocate General Roemer, that the High Authority had rightly assessed the contested trading rules in the light of both provisions. [10]

29. With regard to the relationship between Articles 85 and 86 the case-law of the Court of Justice confirms that although differing constitutive elements are involved, overlapping is possible. The first observations on this point are to be found in the judgment by which in 1966 the Court of Justice dismissed an application brought by the Government of the Italian Republic for the annulment of Regulation No 19/65/EEC. [11]

By that regulation the Council empowered the Commission to adopt regulations concerning block exemptions for exclusive dealing, exclusive purchasing and licensing agreements. The applicant's third submission was that such vertical agreements could not be assessed in the light of Article 85 but only in the light of Article 86. By using Article 85 the regulation wrongly assumed that Article 86 did not apply to such agreements, and consequently infringed that provision. The Court of Justice expressly rejected the view that Articles 85 and 86 should be interpreted 'with reference to the level in the economy at which the undertakings carry on business'. Instead the Court held, and here I shall quote the clearer French version of the relevant paragraph:

'... que chacun des articles 85 et 86, répondant ainsi à des objectifs propres, est indifféremment applicable à divers types d'accords, dès lors que sont réunies les conditions spéciales de l'un ou de l'autre de ces articles'. [12]

Since then the Court of Justice has repeatedly confirmed the concurrent applicability of Articles 85 and 86. In the *Hoffmann-La Roche* case [13] it stated that the fact that the conduct of the undertaking occupying a dominant position falls within Article 85 and in particular within paragraph 3 thereof does not preclude the application of Article 86. Most recently, last

10 — Judgment of 20 March 1957, *Geitling* v *High Authority*, Case 2/56, [1957 and 1958] ECR 3.

11 — OJ, English Special Edition, 1965-66, p. 35.

12 — Judgment in Case 32/65 *Italy* v *Council and Commission* [1966] ECR 563, at p. 592 (French version; the reference for the English version is [1966] ECR 389, at p. 407).

13 — Case 85/76, cited above, at p. 550, paragraph 116; likewise the Opinion of Mr Advocate General Reischl in Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten* v *Commission* [1983] ECR 483, at p. 525.

year in the judgments in the cases of *Ahmed Saeed* [14] and *Ministère public* v *Tournier*[15] the Court of Justice clearly confirmed yet again that Articles 85 and 86 could be applied concurrently where an undertaking in a dominant position concluded agreements restricting competition. In the *Ahmed Saeed* case the Court gave as an example of an abuse the case where the undertaking occupying a dominant position compels the other parties to the agreement to apply inappropriate air-transport tariffs. In the *Tournier* case, the Court did not discuss the relationship between Articles 85 and 86 but assumed as a matter of course that they could be applied in parallel. In connection with a request for a preliminary ruling made by a French court, the Court of Justice considered whether the same conduct, that is to say the system of royalties of the French copyright-management company Sacem, could constitute an infringement of both provisions.

30. Against the background of this case-law, the judgments in the *Continental Can* and *Züchner* cases have no other significance. In the *Continental Can* case the Court of Justice did not rule out the possibility of Article 86 being applied to conduct resulting from an agreement of an undertaking in a dominant position, [16] and no fundamental conclusions should be drawn with regard to the scope of Article 86 from the Court's *obiter dictum* in the *Züchner* case to the effect that solely the provisions of Article 85, and not those of Article 86, apply to concerted practices. [17]

31. The case-law also confirms that an exemption, comparable with that provided for in Article 85(3), from the prohibition of abuse of a dominant position is precluded. As long ago as the judgment in *Continental Can*, the Court pointed to the difference between Articles 85 and 86 resulting from the fact that, unlike Article 85(3), the prohibition of abuses of a dominant position does not recognize any exemption. [18] Mr Advocate General Lenz made it clear in the *Ahmed Saeed* case that that was not an arbitrary decision on the part of the authors of the Treaty but followed necessarily from the system of Community law. I quote: 'abuses cannot be approved, or at any rate not in a community which recognizes the rule of law as its highest principle'. [19]

Consistently, in the *Hoffmann-La Roche* case the Court of Justice acknowledged that the Commission is entitled to proceed on the basis of Article 85 or Article 86 [20] where the conditions of both provisions are met.

32. Lastly, exemption from the prohibition of abuses of a dominant position is impossible also on grounds of the hierarchy of legislation. The Commission is not entitled 'by means of a declaration of exemption under Article 85(3), that is to say by means of a measure of secondary legislation, to permit the undertakings concerned to infringe Article 86, a provision of the treaties establishing the Communities'. [21]

33. It can be considered as the outcome of this investigation into the case-law of the Court that it does not preclude the application of Article 86 also to agreements, decisions and concerted practices which

14 — Judgment in Case 66/86 *Ahmed Saeed Flugreisen and Another* v *Zentrale zu Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, at p. 849, paragraph 37 et seq.

15 — Judgment in Case 395/87 *Ministère public* v *Tournier* [1989] ECR 2521

16 — Case 6/72, cited above, at p. 245, paragraph 25.

17 — Judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, at p. 2030 et seq., paragraph 10.

18 — Case 6/72 *Continental Can*, cited above, at p. 246, paragraph 25; see also the Opinion of Mr Advocate General Roemer, cited above, at p. 257.

19 — Opinion of 28 April 1988 in Case 66/86, paragraph 41.

20 — Case 85/76 *Hoffmann-La Roche*, cited above, at p. 550, paragraph 116.

21 — Second Opinion, of 17 January 1989, of Mr Advocate General Lenz in Case 66/86 *Ahmed Saeed and Another* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, paragraph 18.

have been exempted pursuant to Article 85(3). On the contrary, the case-law contains elements which encourage, if not even enjoin, such an interpretation.

(b) Individual exemption and application of Article 86

34. Let us now turn to the question as to how Community secondary legislation has dealt with the relationship of exemption from the prohibition of agreements, decisions and concerted practices with abuse of a dominant position on the market. Naturally, secondary legislation cannot alter the rules of the EEC Treaty but must always be assessed against those rules.[22] Nevertheless, the interpretation which the Community legislature gives to the Treaty with respect to a question which is not expressly dealt with therein constitutes an important indication as to how the relevant provision is to be construed. Article 87 of the Treaty itself empowers the legislature to adopt provisions in order to give effect to the principles set out in Articles 85 and 86. Consequently, the legislature may give concrete form to the content of the Treaty in that respect, too, and, in so far as questions remain open, supplement it. The courts of the Community are bound by such additions provided that they remain within the confines of the Treaty. Accordingly, in the judgment in the *Ahmed Saeed* case the Court of Justice considered the application of the competition rules laid down in the Treaty also in the light of the secondary legislation.[23]

I would therefore first examine Regulation No 17[24] and the regulations implementing the competition rules in the area of transport in order to see whether they have something to say about the application of Article 86 to conduct which has been exempted by individual decision.

35. (aa) Regulation No 17 does not contain any express provision relating to the effect of the exemption of an agreement, decision or concerted practice on the applicability of Article 86 to the conduct of the undertakings concerned. However, a number of indications with regard to this question can be derived from the regulation:

36. In the provision on powers in Article 9(1) of the regulation, exemption pursuant to Article 85(3) is referred to Article 85(1) only, and not to Article 86. That constitutes an initial indication. I shall consider the further implications of that provision when I deal with the applicant's third argument.

37. Second indication: Article 8(1) of the regulation provides some evidence about the content of the exempting decision. The decision is to be issued for a specified period and conditions and obligations may be attached thereto. The requirement for the exemption to be for a specified time and the possibility of imposing conditions show that the exempting decision permits a limited restriction of competition, that is to say limited by the objective of the restriction, by the extent of its impact on competition and by its duration. Whilst the restriction of competition effected by an agreement, decision or concerted practice can be limited in that way, the restriction of competition resulting from a dominant position cannot be limited in that manner: neither the aim, the extent or the duration of such a restriction is amenable to regulation,[25] unless the dominant position itself

22 — See *inter alia* the Opinion of 28 April 1988 of Advocate General Lenz in Case 66/86 *Ahmed Saeed*, paragraph 41: 'Even a Council regulation which categorized certain modes of conduct as compatible with Article 86 would have to be assessed against the criterion of Article 86.'

23 — Judgment in Case 66/86, ECR 803, at p. 849, paragraph 37.

24 — OJ, English Special Edition 1959-62, p. 87.

25 — Mestmäcker: *Europäisches Wettbewerbsrecht*, 1974, p. 357.

is prohibited. Unlike Article 85, Article 86 does not govern the conditions under which a restriction of competition is permissible, but the consequences of an already existing restriction by placing the conduct of the undertaking in a dominant position under supervision. Those differences between the two provisions show once again that the mechanism for granting exemption from the prohibition laid down in Article 85(1) does not apply to Article 86. Authorization under Article 85(3) for an agreement, decision or concerted practice which is limited in terms of its aim, effect and duration cannot be given the effect of removing from control under Article 86 for perhaps three years (!) the much more comprehensive effects on competition resulting from an undertaking's dominant position on the market.

38. Third indication: Article 8(3)(d) of Regulation No 17 provides for the retroactive revocation of the exemption where the parties abuse it. Consequently, the parties to an exempted agreement, decision or concerted practice restricting competition are prohibited from abusing that restriction of competition just as an undertaking in a dominant position is prohibited from abusing its position. There is a clear parallel between the restriction of competition resulting from an agreement exempted under Article 85(3) and the restriction of competition resulting from a dominant position: both are as such permitted but may not be abused. Article 8(3)(d) of Regulation No 17 shows therefore that individual exemption cannot justify conduct which is in the nature of an abuse. Admittedly, that provision is expressed only in terms of the abuse of an exemption from the prohibition of agreements, decisions and concerted practices. However, that is because it deals only with the legal consequences of that type of abuse. It cannot be considered that, because it was necessary to have a special provision to cover the effects of an abuse of exemption on the continued existence of the exemption decision, Article 8 of Regulation No 17 is intended to preclude measures taken by the Commission pursuant to Articles 3 and 15 of that regulation against the especially dangerous abuse covered by Article 86.

39. Finally, the fourth indication is afforded by Article 15(5) of Regulation No 17, which indirectly governs the application of Article 86 during the exemption procedure. Where an agreement, decision or concerted practice is notified pursuant to Article 4 of the regulation, a fine may not be imposed on the conduct notified on account of either an infringement of Article 85(1) or an infringement of Article 86. However, it follows from this that Article 86 also continues to be applicable and have effects during the exemption procedure and only the Commission's power to impose sanctions is limited by a specific provision.

40. In contrast, Regulation No 17 contains no provision governing the application of Article 86 as regards the time following the exemption decision. In general, the problem of the application of Article 86 can no longer arise in that situation, since an agreement, decision or concerted practice which satisfies the conditions for exemption laid down in Article 85(3) cannot at the same time be regarded as constituting an abuse within the meaning of Article 86. Before granting exemption to an undertaking in a dominant position the Commission must check all the conditions laid down in Article 85(3), that is to say in particular the consumers' share of the benefit of the cartel, proportionality of the restrictions imposed and maintenance of competition in respect of a substantial part

of 'the products in question'. If the Commission makes a positive finding in regard to exemption in respect of a given agreement, decision or concerted practice, the same agreement, decision or concerted practice can hardly be held in second proceedings to be an abuse of a dominant position contrary to Article 86. In such a case of individual exemption, the applicant's argument with regard to the need for Community law not to be applied inconsistently is partly correct. It is tempting to assign to a Commission decision exempting an undertaking having a dominant position effects with regard to Article 86 which are similar to negative clearance,[26] which is binding on the Commission, but not on national courts.[27]

41. However, in the event that a party to an exempted agreement or concerted practice obtains a dominant position only later or an undertaking in a dominant position accedes to the exempted agreement or practice subsequently, the Commission's investigation in connection with the exemption cannot have covered the question as to whether the agreement or concerted practice fulfils the conditions laid down in Article 85(3) also in those market conditions. Article 8(3)(a) of Regulation No 17 enables the Commission — *inter alia* where there has been such a change in the factual circumstances — to re-examine *ex nunc* whether the exception from the prohibition laid down in Article 85(1) is still justified.[28] However, since in this case the Commission could not have taken the dominant position into account when carrying out its examination under Article 85(3), the Commission cannot be held to have bound itself in granting the exemption. As a result, the exemption does not preclude the application of Article 86 by means of a decision of the Commission requiring the infringement to be brought to an end.

42. (bb) I now come to the three regulations governing the application of the rules of competition in the transport sector.[29]

The three regulations introduced, in addition to individual exemption by constitutive decision of the Commission, a simplified procedure known as the objections procedure.[30] Under that procedure undertakings involved in a restriction of competition submit an application to the Commission for exemption, which is published in the Official Journal. Interested third parties may submit comments within 30 days. After publication the Commission has 90 days in which to initiate a formal exemption procedure in which it informs the applicant that there are serious doubts about the possibility of granting exemption. If it does not do so, the agreement, decision or concerted practice is to be deemed to be exempt for a limited period; however, the Commission may withdraw the exemption if it finds that the conditions for exemption are not satisfied.

26 — See Hönn: *Die Anwendbarkeit des Artikels 86 EWG-Vertrag bei Kartellen und vertikalen Wettbewerbsbeschränkungen*, Diss. Frankfurt, 1969, p. 67, who, however, comes to a different conclusion.

27 — The effects of negative clearance before national courts are disputed. See, for example, M. Waelbroeck: 'Judicial review of Commission action in competition matters', *Annual Proceedings of the Fordham Corporate Law Institute*, 1983, pp. 179, 203 et seq., with further references.

28 — The Commission must take into account the increase in the degree of concentration on the market when considering an application for the renewal of an individual exemption. Judgment in Case 43/85 *Ancides* v *Commission* [1987] ECR 3131, at p. 3154, paragraph 13.

29 — Regulation (EEC) No 1017/68 (OJ, English Special Edition 1968 (I), p. 302); Regulation (EEC) No 4056/86 (OJ 1986 L 378, p. 4); Regulation (EEC) 3975/87 (OJ 1987 L 374, p. 1).

30 — Article 12 of Regulation No 1017/68 (excluding 'crisis cartels' under Article 6 of the regulation), Article 12 of Regulation No 4056/86 and Article 5 of Regulation No 3975/87.

43. An express provision which refers to the relationship between such individual exemption and Article 86 can be found only in the latest of the three regulations, Regulation (EEC) No 3975/87 on competition in the air-transport sector. Article 5(3) provides that exemption obtained under the objections procedure can be revoked retroactively where 'the parties concerned have given inaccurate information or where they abuse an exemption from the provisions of Article 85(1) or have contravened Article 86'. For their part, Regulations (EEC) Nos 1017/68 [31] and 4056/86 [32] mention only the first two grounds for retroactive revocation.

In contrast, all three regulations deal in the same way with the revocation of exemption granted by a constitutive decision. Whilst abuse of the exemption, as in Article 8(3)(d) of Regulation No 17, [33] is given as a ground for retroactive revocation, Article 86 is mentioned nowhere in that connection.

44. That raises the question as to whether Article 5(3) of Regulation No 3975/87 allows the opposite conclusion to be drawn that application of Article 86 to exempted conduct is precluded in the absence of such an express provision, that is to say in all other cases. That might be assumed if Article 5(3) ordered Article 86 to be applied. However, that is not the case. Rather, Article 5(3) of Regulation No 3975/87 adds to the sanctions attaching to contraventions of Article 86 a further sanction in the form of revocation of exemption in the case of the objections procedure provided for in that regulation. Consequently, contravention of Article 86 additionally causes Article 85(1) also to be retroactively applicable to the agreement, decision or concerted practice. As a result, in such a case the parties concerned contravene not only Article 86 but also Article 85(1). However, that legal consequence does not follow automatically from the applicability of Article 86 and therefore applies only where, as in this case, an express stipulation is laid down to that effect.

The wording of the provision also suggests that the opposite conclusion does not apply. It attaches its legal consequences to a contravention of Article 86 of the EEC Treaty and hence assumes that Article 86 applies to the parties' conduct.

45. If I may sum up, there are several indications in Regulation No 17 and Article 5(3) of Regulation No 3975/87 to the effect that individual exemption does not constitute a barrier to the application of Article 86 but is possibly to be taken into account by the Commission in so far as it might have bound itself. In contrast, Article 86 has effects in the sphere of application of Article 85(3) in so far as it precludes the grant of exemption in respect of conduct which constitutes an abuse of a dominant position. However, that does not mean that undertakings in a dominant position cannot take advantage of an exempting decision. The Commission may grant exemption to such undertakings in so far as it does not give rise to an abuse of the dominant position on the market.

31 — Article 12(3).

32 — *Ibidem.*

33 — Article 13 of Regulation No 1017/68, Article 6 of Regulation No 3975/87 and Article 13 of Regulation No 4056/86.

(c) Block exemption and application of Article 86

46. We have now reached the third stage of our investigation which, taking into account the findings made with regard to individual exemption, will deal with the relationship of block exemption to Article 86.

The regulations authorizing block exemption can be divided into three categories, which reflect the development of block exemption in Community legislation. The stages of that development are characterized by increasing refinement of the bases on which block exemptions are authorized.

47. However, a feature common to all regulations providing for block exemption is that, like individual exemption by decision, they all relate to the prohibition laid down in Article 85(1). There is no regulation providing for block exemption under which the prohibition set out in Article 86 is declared to be inapplicable. However, the regulations differ decidedly from individual exemption inasmuch as they are based on a general, abstract assessment, which is carried out by the legislature *ex ante*, of one type of agreement and is, as a general rule, guided by the effects of the agreement under normal conditions of competition. No specific investigation is carried out into the conditions of Article 85(3) which covers the circumstances on one of the markets concerned or the market position or dominant position of a particular undertaking.[34] This is an important difference which has the legal effects in the event of a block exemption — as compared with those of an individual exemption — which I shall describe.

48. As far as their content is concerned, regulations on block exemption differ in so far as some of them are based on market structures, whereas most do not contain such a limitation. Where block exemption does not depend on market structures, it is granted solely on the basis of the abstract decision taken by the legislature.

That is true above all of the oldest Council regulation authorizing exemptions, Regulation No 19/65 on exclusive supply and licensing agreements, and of the block-exemption regulations adopted pursuant thereto, one of which is the regulation on patent licensing agreements which applies in this case.[35] With one exception, block exemptions granted pursuant to Regulation No 19/65 apply irrespective of the market structure.

Only Regulation (EEC) No 1984/83 also contains a provision restricting the exemption of exclusive purchasing agreements between competing manufacturers to small and medium-sized undertakings.[36] As a result, the Community legislature makes undertakings with a dominant

34 — Wertheimer: 'Het adagium van artikel 86, EEG: "Quod licet bovi non licet jovi"', in *Europees Kartelrecht Anno 1980*, p. 143, at p. 212.

35 — Regulation No 67/67/EEC (OJ, English Special Edition 1967, p. 10), since replaced by Regulations (EEC) Nos 1983/83 (OJ 1983 L 173, p. 1), and 1984/83 (OJ 1983 L 173, p. 5); Regulations (EEC) Nos 2349/84 (OJ 1984 L 219, p. 15), 123/85 (OJ 1985 L 15, p. 16), 4087/88 (OJ 1988 L 359, p. 46) and 556/89 (OJ 1989 L 61, p. 1).

36 — Paragraph 10 of the preamble, Article 3(b) and Article 5.

position on the market generally ineligible to obtain exemption for such agreements.

49. The following also emerges with regard to the relationship between Article 86 and block exemption: the authorizing regulation does not refer to Article 86. In contrast, two block-exemption regulations, namely Regulation (EEC) No 1983/83 on exclusive distribution agreements and Regulation No 1984/83 on exclusive purchasing agreements, make it expressly clear in their preambles that they do not preclude the application of Article 86.[37]

50. The second 'family' of block-exemption regulations takes that approach a step further. It includes authorizing Regulation (EEC) No 2821/71 and Regulations (EEC) Nos 417/85 and 418/85, adopted pursuant thereto, on specialization agreements and research and development agreements, respectively.[38] 'Horizontal' Regulations Nos 417/85 and 418/85 make block exemption dependent upon the participating undertakings' market share and turnover not exceeding a certain level.[39] Accordingly, as a rule, at least, undertakings having a dominant position cannot claim exemption under those two regulations.

51. The provisions governing withdrawal of block exemption in individual cases have also evolved over time. Article 7 of Regulation No 19/65 provides for withdrawal where the exempted conduct has effects which are incompatible with Article 85(3). It is not stated whether such withdrawal can be retroactive or can be effective only as regards the future. For its part, Regulation No 2821/71 makes it expressly clear in the last recital in its preamble that block exemption can be withdrawn only prospectively. Article 7 of that regulation, which provides for the withdrawal of exemption, corresponds word-for-word to the earlier Article 7 of Regulation No 19/65. That shows that withdrawal, even in its field of application, is intended to be permissible only *ex nunc*.

52. The third and most recent category of block-exemption regulations is in the air-transport sector. The basis for the grant of the exemptions is Council Regulation (EEC) No 3976/87.[40] It does not make undertakings in a dominant position ineligible for exemption. However, there is a new factor in as much as the authorizing regulation itself deals with the consequences of an infringement of Article 86. Under Article 7(2) block exemption may be withdrawn in a particular case where the exempted agreement, decision or concerted practice 'has effects which . . . are prohibited by Article 86'. It is expressly stated in the preambles to the three block-exemption regulations[41] adopted pursuant to Regulation No 3976/87 that they are without prejudice to Article 86. They all provide for withdrawal of exemption for agreements, decisions and concerted practices which are 'prohibited by Article 86 of the Treaty'.[42]

At the same time, Article 7(2) of Regulation No 3976/87 makes it clear that withdrawal

37 — Paragraph 15 of the preamble to Regulation No 1983/83 and paragraph 23 of the preamble to Regulation No 1984/83.

38 — Regulation (EEC) No 2821/71 (OJ, English Special Edition 1971 (III), p. 1032); Regulation (EEC) No 417/85 (OJ 1985 L 53, p. 1); Regulation (EEC) No 418/85 (OJ 1985 L 53, p. 5).

39 — Article 3 of Regulation No 417/85; Article 3(2) and (3) of Regulation No 418/85 (market share only).

40 — OJ 1987 L 374, p. 9.

41 — Regulations (EEC) Nos 2671/88, 2672/88 and 2673/88 (OJ 1988 L 239, pp. 9, 13 and 17).

42 — Article 7 of Regulation No 2671/88, Article 11 of Regulation No 2672/88 and Article 4 of Regulation No 2673/88.

of the exemption is not the only outcome of the infringement of Article 86, since it provides that the Commission may also 'take, pursuant to Article 13 of Regulation No 3975/87, all appropriate measures for the purpose of bringing these infringements to an end'. That provision empowers the Commission to impose penalty payments if undertakings fail to comply with a decision of the Commission requiring them to bring an infringement against Article 86 to an end.[43] In contrast, no reference is made to Article 12 of Regulation No 3975/87, which empowers the Commission to impose fines in the event of infringements of Article 86.

53. In the maritime transport sector the Council did not grant the Commission any authorization to adopt block-exemption regulations. In Articles 3 and 6 of Regulation No 4056/86 on maritime transport[44] the Council itself granted block exemptions, which, once again, refer only to the prohibition of agreements, decisions and concerted practices laid down in Article 85(1). Like the actual block-exemption regulations, Regulation No 4056/86 provides, in Article 8, for the withdrawal of exemption where in a particular case effects occur which are incompatible with Article 86. In addition, under the general procedure provided for in Article 10 the Commission can still 'initiate procedures to terminate any infringement of the provisions of . . . Article 86 of the Treaty'.

54. Let us now endeavour to derive some general principles from this abundance of legislation. In carrying out this exercise, it must be borne in mind that, despite their differences in points of detail, all block exemptions constitute an instrument for implementing Article 85(3). Consequently provisions of a block-exemption regulation may also be relevant for the interpretation of other regulations. It would be contrary to the system of the Treaty to destroy the uniform application of Articles 85 and 86 in the various sectors covered by block-exemption regulations by drawing artificial distinctions. For that reason my overall survey of block-exemption regulations has extended far beyond Regulation No 2349/84.

55. Having said that, I should like to draw the following conclusions: in so far as the legislature does not in any event deny to undertakings in a dominant position the benefit of block exemption by means of provisions laying down thresholds, Article 86 applies in cases where block exemption has been granted. The legislature has recognized this in the preambles to two block-exemption regulations in which the regulations themselves contain no actual provisions governing the application of Article 86.[45] Whilst, however, Article 86 can have an effect in the case of individual exemption both in the procedure for the grant of and in the procedure for withdrawing such exemption, in the case of block exemption it can only play a part in the withdrawal procedure, since in the case of block exemption in place of the individual grant of exemption an abstract decision taken by the legislature *ex ante* decides what is to be the content of the relevant block-exemption regulation.

Because there is no individual procedure for the grant of exemption there is a danger that block exemption may benefit an agreement, decision or concerted practice which in fact does not satisfy the

43 — Such a decision may be adopted under Article 4 of Regulation No 3975/87.

44 — OJ 1986 L 378, p. 4.

45 — Regulations Nos 1983/83 and 1984/83.

requirements laid down in Article 85(3). Since block exemption of an agreement, decision or concerted practice does not necessitate any prior examination on the part of the Commission as to whether the criteria set out in Article 85(3) are fulfilled in the particular case, it can also not be regarded as being 'tacit negative clearance' with regard to Article 86 and result in the Commission having bound itself as regards the application of that provision. In that respect, the effect of block exemption is weaker than that of individual exemption.

However, where as in this case an undertaking in a dominant position only obtains the benefit of the block exemption subsequently, the question as to whether the Commission can be said to have bound itself does not arise in any event. As we have seen, not even an individual exemption can cause the Commission to bind itself where the undertaking having the dominant position only subsequently accedes to the exempted agreement.

56. On the other hand, retroactive withdrawal of the block exemption is precluded. This appears to be justified by the fact that block exemption is based directly on legislation and not, as in the case of an individual exemption, on an administrative decision. In that respect the legal effectiveness of a block exemption is stronger than that of an individual exemption.

The fact that an authorizing regulation and four of the more recent block-exemption instruments have included infringement of Article 86 among the grounds for withdrawal of the exemption confirms the finding that Article 86 also remains applicable during the currency of a block exemption.

It cannot be inferred from those special provisions that Article 86 cannot be applied in the sphere of the other block-exemption regulations until the block exemption is withdrawn. As I have already stated in connection with individual exemption with regard to the corresponding Article 5(3) of the regulation on competition in the air-transport sector, the aim of such provisions is simply to introduce an additional sanction for infringements of Article 86 — in this case withdrawal of the benefit of the block exemption. Even in the case of an agreement, decision or concerted practice which is void under national law for infringing Article 86, that additional sanction is not redundant since the revocation of the exemption with respect to Article 85 has some significance of its own. The special provisions therefore assume that Article 86 is applicable concurrently with a block exemption.[46]

57. However, the applicant considers that block-exemption regulations have been used by the legislature to foster certain types of agreements. That aim of the legislature would be undermined by application of Article 86. Against this, it must be held, in common with the Commission, that the adoption of block-exemption regulations serves only to promote administrative simplification. It does not appear to me to be true that agreements, decisions and restrictive practices exempted from the prohibition laid down in Article 85(1) are generally desirable from the point of view of competition policy. Exemption merely restores the freedom of contract of the

46 — For a different opinion, see Wiedemann: *Kommentar zu den Gruppenfreistellungsverordnungen des EWG-Kartellrechts*, Vol. 1, 1989, Allgemeiner Teil, p. 120 et seq., paragraphs 371 and 373, on the Commission decision contested in these proceedings.

undertakings concerned, it has no management function in regard to competition policy.[47]

58. Consequently, I should like to set down as the result of my examination of the first argument that it is not logically or legally inconsistent to assess the applicant's conduct against the prohibition set out in Article 86 even though the exclusive licence which it obtained was subject to Commission block-exemption Regulation No 2349/84.

(2) *Acquisition of the patent licence as an abuse of a dominant position*

59. The second aspect to be investigated in this first part of my Opinion is concerned with whether the Commission was right to regard the mere acquisition of the exclusive licence by the applicant as an infringement of Article 86. Admittedly the applicant has not contested the findings of fact made by the Commission, but at the hearing it expressed the view that the facts as found disclosed no infringement of Article 86. As a result the contested decision must also be considered in that respect.

(a) The elements making up an abuse of a dominant position

60. In this connection I would first take up a point which arose in the discussion at the hearing. The question raised was whether Article 86 is to be applied in two ways and has two types of significance depending on whether or not a block exemption is involved. I take the view that it is clear from my analysis so far that the prohibition set out in Article 86 applies equally in both situations. As far as the legal consequences of an infringement of the prohibition are concerned, we have seen, however, that the Community legislature has dealt with them differently in different block-exemption regulations and, in particular, has restricted the Commission's power to impose sanctions.[48] On the basis of Article 87 the legislature is entitled to implement such differentiation, which only affects the consequences which secondary legislation attaches to an infringement of Article 86. Where it does not do so, as here in the case of Regulation No 2349/84 on patent licensing agreements, the application of Article 86 continues to be governed by the general provisions for its implementation, namely Regulation No 17 in this case.

61. However, the applicant concludes on the basis of the Court's judgment in the *Ahmed Saeed* case[49] that there is a substantive particularity in this case as regards the application of Article 86. It takes the view that conduct consisting solely in the conclusion of an agreement exempted under Regulation No 2349/84 is not a sufficient basis to ground a charge of abuse, and that an additional element is necessary. It maintains on the basis of the judgment in *Ahmed Saeed* that the additional element is

47 — Koch, in Grabitz: *Kommentar zum EWG-Vertrag*, paragraphs 192 and 156, on Article 85 of the EEC Treaty.

48 — See Article 7(2) of Regulation (EEC) No 3976/87.

49 — Judgment in Case 66/86 *Ahmed Saeed Flugreisen* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, paragraphs 37 and 42.

that the undertaking occupying the dominant position on the market must have imposed the exempted agreement on the other party to the agreement.

I would first observe that the applicant is selective in quoting from the judgment on which it relies: the Court states that an abuse of a dominant position on the market may be held to exist in particular 'where such imposed tariffs must be regarded as unfair conditions of transport with regard to competitors or with regard to passengers'. That means that the Court of Justice did not regard an undertaking in a dominant position using its power to impose contractual conditions as the sole, indeed not even a sufficient, criterion for making out an abuse. Rather, the reasonableness of the content of the contract which is imposed plays a decisive role. This shows that behind the requirement for an 'additional element', which the applicant is trying to infer from the judgment in the *Ahmed Saeed* case, there is in reality a general question, namely that of the conditions under which the conduct of an undertaking in a dominant position is to be regarded as an abuse of that position.

62. The Court of Justice has gradually evolved guidelines with respect to that basic question in connection with Article 86: first, it interpreted Article 86 in the light of Article 3(f), according to which the Community has the task of instituting a system 'ensuring that competition in the common market is not distorted'.[50] In the judgment in *Continental Can* the Court of Justice laid down as the first decisive element of abusive conduct the fact that the undertaking's conduct strengthens its dominant position and thereby substantially fetters the — in any event, weakened — residual competition. According to that judgment, which the Commission relies on in the decision in this case,[51] the finding of an abuse depends on the restraint of competition to which the conduct of the undertaking in a dominant position — in that case, the acquisition of an 80% holding in a competitor — gives rise.[52]

63. If a restraining effect on competition only is allowed to suffice in order to characterize the conduct of an undertaking in a dominant position as abusive, the danger will arise that Article 86 will be applied to all the profit-making activities of the said undertaking. That would at least come close to prohibiting dominant positions, which is not provided for in the Treaty. Consequently, Article 86 must be considered more closely in this regard.

Since Article 86 does not prohibit the existence of a dominant position *per se*, an undertaking in a dominant position may also act in a profit-oriented way and strive to expand its business activities. It may reinforce its dominant position on the market through competition and drive less efficient competitors from the market, even if that results in its market share reaching 100%.[53] The EEC Treaty does not require the undertaking in a dominant position to act in a way which makes no economic sense and is against its legitimate interest. If it did, Community law would conflict with other obligations to which an undertaking in a dominant position — like any other

50 — For example, the judgments in Case 6/72 *Europemballage and Continental Can* v *Commission*, cited above, at p 244 et seq., in Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, at p 253, in Case 13/77 *Inno* v *ATAB* [1977] ECR 2115, at p 2145, paragraph 28 et seq., in Case 27/76 *United Brands* v *Commission*, cited above, at p. 286, paragraph 63 et seq. and in Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, p 552, paragraph 125 and p. 554, paragraph 132.

51 — Paragraph 46 of the contested decision.

52 — Cited above, at p. 245, paragraph 26. However, the Commission decision was annulled because it failed sufficiently to define the relevant market.

53 — Temple Lang: *Monopolization and the definition of 'abuse' of a dominant position under Article 86 of the EEC Treaty*, CMLR 1979, p.345, at p. 351.

undertaking — is subject. I am thinking of, for instance, the company-law obligation on management organs to use the capital entrusted to them by the shareholders in order to make a profit and undertakings' responsibility for safeguarding jobs.

64. Abuse is — according to the judgment in *Hoffmann-La Roche* — an objective concept [54] which does not imply that the use of the economic power bestowed by the dominant position is the means whereby the abuse has been brought about. [55] Accordingly, steps which an undertaking not in a dominant position might also take — such as, for example, the acquisition of a patent licence, the acquisition of a holding in another undertaking or the conclusion of a sole purchasing agreement — are not excluded from assessment under Article 86. Contrary to the view taken by the applicant, it is not necessary in order for its conduct to be described as an abuse for it to have used its market power in order to impose the conclusion of the licensing agreement. [56] Even undertakings' conduct which is neutral in terms of value may conflict with Article 86 where it is of such a kind as to lead to undesirable effects with respect to the Community's rules on competition.

65. Accordingly, Article 86 confers on the undertaking in a dominant position special responsibility 'not to allow its conduct to impair genuine undistorted competition on the common market'. [57] In order to avoid that special obligation of the undertaking in a dominant position from conflicting with the principle that dominant positions as such are not prohibited, it is necessary to have additional characteristics whereby abusive conduct can be differentiated from means of normal competition. Where are those characteristics to be found?

66. An initial answer is supplied by the development by the Court of Justice of the concept of abuse as expressed in the two-part definition set out in the judgment in *Hoffmann-La Roche*. According to that definition, in addition to a restraint of competition the undertaking in a dominant position must have used methods 'different from those governing normal competition in products or services based on traders' performance'. [58] The Court of Justice considered as being such methods, for example, the sole purchasing agreements which Hoffmann-La Roche had concluded with some of its customers.

67. The question arises, however, as to whether only methods different from those governing normal competition come under consideration. In order to answer that question let us return once again to the content of Article 86:

The provision contains four examples of abuses of a dominant position. The first two examples are concerned primarily about protecting parties to contracts with undertakings in dominant positions and

54 — Judgment in Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, at p. 541, paragraph 91.

55 — Judgment in *Hoffmann-La Roche*, cited above; however, a different view is taken in some academic writings, e. g. Koch, in Grabitz: *Kommentar zum EWG-Vertrag*, paragraph 45 et seq., on Article 86.

56 — See the judgment in *Hoffmann-La Roche*, cited above, at p. 551, paragraph 120.

57 — Judgment in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, at p. 3511, paragraph 57.

58 — Judgment in Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, at p. 541, paragraph 91; likewise, the judgments in Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775, at p. 3794, paragraph 27 and in Case 322/81 *Michelin* v *Commission*, cited above, at p. 3514, paragraph 70.

consumers against exploitation of their dependence on the dominant undertaking, whilst the prohibition in subparagraph (d) on making the conclusion of contracts subject to the acceptance of supplementary obligations is clearly aimed at protecting competitors as well as contracting parties and example (c) prohibits discrimination as between the trading partners of the undertaking in a dominant position which would have an adverse impact on competition. The common feature shared by the first three examples is that the conduct to which they refer pursues the legitimate end of making profits through disproportionate means. Cases of abuse not expressly mentioned can be inferred from those examples. They point to limits which the undertaking in the dominant position must respect even in the case of activities which fall outside the examples,[59] namely the principle of proportionality[60] and the prohibition of discrimination.

68. In this case, the principle of proportionality is of primary importance, since the complaint relating to the acquisition of the exclusive licence(and only the exclusive licence) implies a complaint of disproportionate conduct. Applied to the conduct of an undertaking in a dominant position, that principle has the following meaning: 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.

69. The Court of Justice has assessed the conduct of undertakings in a dominant position in terms of the principle of proportionality in this way in a series of decisions.

Thus, in *BRT* v *Sabam and Fonior*[61] the Court of Justice held that conditions imposed by a copyright-management association in contracts intended to protect members' rights were unfair and therefore an abuse because they encroached more severely on members' freedom to exercise their copyrights than was necessary in order effectively to protect those rights.

Similar considerations are to be found in the judgment in the *Suiker Unie* case,[62] where it was held that where an undertaking occupying a dominant position agrees clauses with its trade representatives which prohibit competition, this may constitute an abuse if the scope of the prohibition is enlarged 'to such an extent that it no longer corresponds to the nature of the legal and economic relationship in question' (that is to say, the relationship of the undertaking with its trade representatives).

70. The application of the principle of proportionality is especially clear in the *United Brands* case. In that well-known case the Court of Justice first declared that a prohibition imposed by the applicant on the resale by customers of green bananas was an abuse because it infringed that principle.

59 — Judgment in Case 6/72 *Europemballage and Continental Can* v *Commission*, cited above, at p. 246, paragraph 26.

60 — For a fundamental appraisal of this topic see Vogel in *Droit de la concurrence et concentration économique*, Paris, 1988, p 154 et seq.

61 — Judgment in Case 127/73 *Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs* v *Sabam and Fonior* [1974] ECR 313, at p. 316 et seq.; however, the conduct in issue in that case relates to the example given in indent (a) of the second paragraph of Article 86.

62 — Judgment in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Cooperatieve vereniging "Suiker Unie" UA and Others* v *Commission* [1975] ECR 1663, at p. 2002, paragraph 486.

The Court of Justice acknowledged that it was lawful for the applicant to pursue a policy of quality when choosing its sellers but that the practice adopted 'raised obstacles, the effect of which went beyond the objective to be attained' and which were therefore prohibited under Article 86. In the same judgment, the Court of Justice recognized that an undertaking in a dominant position was entitled to adopt sanctions against trading partners where they acted contrary to its commercial interests. Nevertheless, such sanctions must be proportionate to the threat which the conduct of the trading partner poses to the interests of the undertaking occupying a dominant position.[63] United Brands' action in discontinuing deliveries to a customer because that customer had taken part in an advertising campaign for one of its competitors was not proportionate in that sense.

71. Only recently the Court of Justice decided that proportionality was the yardstick for assessing whether the royalties charged by the French copyright-management company Sacem constituted an abuse because Sacem invariably gave rights of access to the whole of its repertoire and did not allow licensees to have access to just that category of works in which they were interested against payment of a commensurately smaller royalty. The Court of Justice stated that that conduct, which pursued the legitimate aim of protecting the interests of authors, composers and publishers of music, would be exceptionable only if other methods might be capable of achieving the same aim without a resultant increase in the expenses incurred by Sacem for management and monitoring.[64] According to that same judgment, the same considerations determine whether contracts concluded with users of recorded music in accordance with such a practice can be regarded as restrictive of competition for the purposes of Article 85(1).[65] Here can be seen the importance of the criterion of proportionality for assessing conduct both under Article 85 and under Article 86.

72. That close substantive connection between the two provisions is also borne out by the judgment in *Hoffmann-La Roche*. There the Court of Justice admittedly did not expressly examine whether the conduct of which the undertaking in a dominant position was accused was proportionate yet, as Vogel has shown,[66] it referred indirectly to the principle of proportionality. In considering the exclusive purchasing contracts concluded with its customers by the undertaking in a dominant position the judgment states that 'such agreements could only possibly be admissible in the context of, and subject to the conditions laid down in, Article 85(3) of the Treaty'.[67] Those conditions include the proportionality of the agreement, which consists, according to Article 85(3)(a), in the fact that the undertakings concerned must not have had imposed on them 'restrictions which are not indispensable to the attainment of these objectives [that is to say, the objectives referred to in Article 85(3)]'. Therefore, contrary to the view taken by the applicant, the additional element does not necessarily have to be inferred from circumstances external to the agreement, it may instead also be inherent in the content of the agreement itself where it constitutes disproportionate conduct by the undertaking in a dominant position.

63 — Judgment in Case 27/76 *United Brands* v *Commission*, cited above, at p. 298.

64 — Judgment in Case 395/87 *Ministère public* v *Tournier*, paragraph 45, concerning the example set out in indent (a) of the second paragraph of Article 86.

65 — Cited above, paragraph 31.

66 — *Droit de la concurrence et concentration économique*, p. 155, footnote 1.

67 — Judgment in Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, at p. 551, paragraph 120.

73. Admittedly in the present case there is also a special legal problem inasmuch as the subject-matter of the agreement at issue is a patent licence. It must therefore be considered whether it is compatible with the case-law of the Court of Justice relating to the application of Article 86 to industrial property rights for the applicant's conduct to be assessed in terms of the aforementioned criteria.

Only recently, in its judgment in the *Maxicar* case, the Court of Justice confirmed the case-law [68] to the effect that the mere fact of securing the original benefit of an exclusive right granted by law — in that case protective rights in respect of ornamental models for car bodywork components — cannot be regarded as abusive conduct within the meaning of Article 86. [69]

Instead, in that instance, too, [70] the Court distinguishes between the acquisition of the right and its exercise. Only the latter is capable of degenerating into an abuse, [71] for instance in the event of an arbitrary refusal to supply, the fixing of prices at an unfair level or a decision curtailing production. [72] There is always an additional element on top of the acquisition of the protective right. However, that additional element cannot simply be the fact that competition from other manufacturers with respect to the protected product has been eliminated, since that effect is inseparable from the existence of the protective right. [73]

74. Nevertheless, I do not consider that these principles, which the Court of Justice has developed in regard to the original acquisition of industrial property rights, can be transposed directly to the derived acquisition of an exclusive licence. Where a patent or registered design is obtained by its originator, the undertaking is protecting its own development work from imitation by third parties. An undertaking occupying a dominant position may also protect itself in that way, even when in so doing, as in the *Maxicar* case, it drives out from the market undertakings whose business previously consisted in imitating the products in question. [74]

In contrast, the acquirer of a patent license procures for himself the development work carried out by others. That is legitimate, but it distinguishes his legal position from that of the original proprietor of the protective right. It is to the latter that the exclusive entitlement to the substance of that right belongs and it is intended to allow him to obtain the reward for his creative effort. [75] However, as far as the licensee is concerned, it is a question, not of reward for the efforts and risks which he himself incurred in developing the protected item (he pays that reward to the inventor), but of the most profitable employment of an investment. Consequently, unlike the industrial property right itself, the licence is not necessarily exclusive. Those differences justify not extending to the licensee the special position which the proprietor of an industrial property right enjoys in the context of Article 86.

The fact, therefore, that an inventor occupying a dominant position on the market may exclude third parties from exploiting his own invention without his

68 — For example, the judgments in Case 24/67 *Parke, Davis* v *Centrafarm* [1968] ECR 55, at p. 71 et seq. (patent) and in Case 102/77 *Hoffmann-La Roche* v *Centrafarm* [1978] ECR 1139, at p. 1168 (trademark),

69 — Judgment in Case 53/87 *CICR and Maxicar* v *Renault* [1988] ECR 6039, at p 6072, paragraph 15.

70 — In like manner to the established case-law of the Court of Justice on the difference between the existence and the exercise of industrial property rights for the purposes of the application of Article 36; see, for example, the judgment in Case 15/74 *Centrafarm* v *Sterling Drug* [1974] ECR 1147

71 — Judgment in Case 24/67 *Parke, Davis* v *Centrafarm*, cited above, at p 72

72 — Judgment in Case 53/87 *CICR and Maxicar* v *Renault*, cited above, paragraph 16, likewise the judgment in Case 238/87 *Volvo* v *Veng* [1988] ECR 6211, paragraph 9

73 — Opinion of Mr Advocate General Mischo In Case 53/87 *CICR and Maxicar* v *Renault*, cited above, paragraph 60

74 — Likewise in Case 238/87 *Volvo* v *Veng*, referred to above

75 — Judgment in Case 19/84 *Pharmon* v *Hoechst* [1985] ECR 2281, at p 2298, paragraph 26

conduct constituting an abuse does not signify that undertakings occupying a dominant position may, by acquiring an exclusive licence, invariably exclude their potential competitors from using the research findings made by third parties.

(b) The establishment of an infringement in the contested decision

75. We saw in the first part of my discussion that Article 86 can also be applicable to an agreement which is the subject of a block exemption. After that I showed that Article 86 is fulfilled where conduct of an undertaking in a dominant position which restricts competition is in addition disproportionate. That also applies to the derived acquisition of a patent licence by the undertaking occupying a dominant position. Against that legal background it must now be examined whether the Commission was right to hold that there was an infringement of Article 86.

In paragraph 60 of the contested decision, the Commission claims that the abuse of the dominant position by the applicant consisted in the acquisition of the exclusive licence, which had the effect of strengthening the dominant position, further weakening existing competition and rendering even more difficult the entry of any new competitors onto the market. Consequently, in the result the Commission was right in law to base its decision on disproportionate conduct on the part of the applicant which restricted competition, even though it refers in the decision only to the judgment in *Continental Can* and does not expressly take into account the point of view of proportionality which the Court developed in subsequent decisions.[76] A further question arises as to whether the findings of fact set out by the Commission in paragraphs 18, 22 and 23 of the contested decision bear out the legal conclusions reached therein.

76. (aa) It first must be considered whether conduct on the part of the applicant restricting competition has been made out: the acquisition of the exclusive licence strengthened the applicant's dominance of the market *vis-à-vis* all its competitors, because they did not have access to the technology in question. Even before it acquired the exclusive licence, the applicant's share of the market in aseptic filling machines was around 91.8%; the exclusive licence for the alternative sterilization process belonged to its potential competitor, Liquipak, which was endeavouring to break into the market dominated by the applicant.

After its acquisition, the exclusive licence belonged to the applicant; the alternative technology protected by the patent was thereby taken out of reach of all Tetra's potential competitors. That the applicant acquired the licence in connection with its take-over of Liquipak, which is not at issue in these proceedings, makes no difference to this outcome. Even the acquisition of the licence alone would have prevented all potential competitors of the applicant from using the alternative sterilization process in order to gain access to the market.

77. The Commission also found in paragraph 18 (and paragraph 27) of the contested decision that as a result of the acquisition of the exclusive licence the applicant's competitor Elopak was excluded from the market, at least temporarily. The Commission stated at the hearing that that

76 — See paragraphs 46 and 47 of the contested decision.

constituted the abuse carried out by the applicant.

At the hearing the applicant argued that the findings set out in the decision with regard to the position and conduct of Elopak were not unequivocal and did not support the claim that Article 86 had been infringed. Whether it is permissible under Article 42 of the Rules of Procedure of the Court of Justice (under Article 11 of the Council decision of 24 October 1988[77] those rules are, at present, applicable in this court), given that a defective statement of reasons was not raised as an issue, for that part of the decision to be addressed only at the hearing seems to me to be doubtful, as is plain from my question at the hearing. Even if that submission were to be admitted as an additional argument with regard to the ground of the application relating to the infringement of Article 86, the following would have to be taken into account.

The Commission's findings that the applicant strengthened its dominant position *vis-à-vis* — all — competitors and at least considerably delayed Elopak's entry onto the market clearly point to conduct on the part of the applicant which restricted competition. That outcome would be unaffected — and I would point this out in the alternative — if this court should uphold the applicant's claims with regard to the findings of fact made with regard to Elopak's conduct. Even if the Court of First Instance takes no account of that area, which is to some extent in dispute and has not been fully clarified in the course of the proceedings, the finding remains that by acquiring the licence the applicant further strengthened its market power *vis-à-vis* all competitors. That restricting effect on competition itself is enough to satisfy Article 86, without there being any need to establish additional, specific effects on the conduct of a particular competitor. It is enough that the applicant took exclusive possession of the alternative technology and thereby excluded all potential competitors from using it. In that way alone it increased the barriers to entry onto the market and made it more difficult for potential competition to come about.

78. (bb) In addition, the acquisition of the exclusive licence constituted a disproportionate method. Granted, the utilization of technical progress through the acquisition of patent licences is part of competition with regard to efficiency, in which the applicant as an undertaking occupying a dominant position is entitled to participate. However, it was not necessary for the purposes of the applicant's legitimate aim of obtaining access to technological innovations in order to improve its efficiency for it to deploy a method which was so plainly and directly restrictive of competition. Rather, the Commission rightly assumed that a non-exclusive licence would also have enabled the applicant to use the patented process in order to improve its own products, but without at the same time impeding new competitors' access to the market on which it occupied a dominant position.

It follows that the actual content of the agreement shows the disproportionality of the conduct adopted by the applicant, which as an undertaking in an dominant position was not entitled to enter into an agreement having such a content. This also shows specifically that, contrary to the view taken

77 — OJ 1988 L 319, p. 1; corrected version in OJ 1989 C 215, p. 1.

by the applicant, not only an aspect outside the agreement can be relevant as an 'additional element'.

79. The fact that the exclusive patent licensing agreement fell within a block-exemption regulation does not alter the disproportionate nature of the applicant's conduct: perusal of the preamble to Regulation No 2349/84 shows that the abstract check on proportionality carried out by the legislature did not take into account situations such as the one at issue in this case. Under normal market conditions, exclusive licences serve to disseminate new products or manufacturing processes. Their exclusivity can be justified on the ground that because of the risks regularly associated with the introduction of new products or manufacturing processes, investment in such innovations necessitates a special incentive. The protection secured by the exclusivity of the licence facilitates the licensee's access to the market. As a result it helps to improve supply and increase the number of production facilities and promotes the dissemination of technical progress. [78]

Those considerations cannot justify in this case the acquisition of the exclusive licence by the applicant. On the contrary, its conduct has repercussions which conflict with the aims of Regulation No 2349/84 in so far as it impedes other undertakings' access to the market and impedes any increase in the number of production facilities.

80. Lastly, the assessment of the applicants' conduct as disproportionate is unaffected by the fact that the licensor, British Technology Group, was in agreement with the transfer of the exclusive licence. The special responsibility borne by Tetra as an undertaking occupying a dominant position debars it from acting in ways which restrict competition disproportionately, even where such conduct is in the interest of the other party to the agreement. [79]

81. It can therefore be held in answer to the applicant's first argument that, in itself, the acquisition of an exclusive licence by an undertaking in a dominant position does not constitute an abuse within the meaning of Article 86. However, if in addition, as in this case, that conduct further adversely affects competition on the market in which the undertaking is dominant and the conduct is disproportionate to the legitimate aims of the said undertaking, the conditions laid down in Article 86 are satisfied.

II — *Infringement of the principle of legal certainty*

82. The applicant's second argument is that it would be contrary to the principle of legal certainty for Article 86 to be applied to conduct covered by a block-exemption regulation. Just as withdrawal of exemption may only be effective prospectively, Article 86 may likewise only be applied to its conduct *ex nunc*. If that were not so, undertakings in a dominant position and parties to agreements with such undertakings could never benefit from block exemption, the chief advantage of which lies in the fact that the parties can rely on an agreement whose content is exempted being permissible and effective.

78 — Paragraphs 11 and 12 in the preamble to Regulation No 2349/84.

79 — See the judgment in Case 85/76 *Hoffmann-La Roche* v *Commission*, cited above, at p. 549, paragraph 115.

83. Legal certainty, like the related principle of legitimate expectations, is one of the general principles of Community law, recognized by the established case-law of the Court of Justice.[80] Under the two principles the application of the law in an individual case must be predictable.[81] The principle of legal certainty plays a role chiefly in the interpretation of the applicable law and can limit unexpected application of the law so as to avoid legal relationships which were established in good faith from being called into question after the event.[82] That principle proved to be of relevance for the application of the competition rules laid down in the Treaty as long ago as 1962 when the Court of Justice in the *Bosch* case based the doctrine of the provisional validity of subsisting cartels on the principle of legal certainty and, as a result, considerably limited the direct applicability of Article 85(1) and (2).[83] Recently in cases concerning the air-transport sector the Court of Justice again had recourse to the rules developed at that time.[84]

84. The principle of legitimate expectations relates primarily to changes in the legal situation or in an existing practice with regard to the application of the law by Community institutions and is particularly important where traders have acted in reliance on the state of affairs obtaining until then and have suffered disadvantages as a result of the change which has occurred.[85] In both cases, it is necessary to balance the interests founded on legitimate expectations, on the one hand, against the principle that the administration must act in accordance with the law[86] and against the margin for manoeuvre left to the Community institutions. Only special, unreasonable hardships may, exceptionally, justify the principle that the administration must act in accordance with the law and the discretion of the legislature having to give way to the requirements of legal certainty.

85. The applicant's second argument therefore turns on whether undertakings occupying a dominant position are exposed to unreasonable uncertainty as a result of Article 86 being applied to their conduct, even though it was covered by a block exemption, before the block exemption has been withdrawn with prospective effect. As I shall explain in more detail in two stages, it appears to me that the principle of legal certainty was not infringed in this case. In the first place, the application of Article 86 in a case like that of the applicant is generally predictable. But, secondly, there was in the applicant's case additionally no adverse effect on a legal relationship which was founded in good faith on the non-applicability of Article 86.

80 — For a detailed account of the application of the two principles in the sphere of competition law, see David Edward: 'Constitutional rules of Community law in EEC competition cases', scheduled for publication in the *Annual Proceedings of the Fordham Corporate Law Institute*, 1989, p. 28 et seq. of the manuscript.

81 — See, for example, the judgments in Joined Cases 212 to 217/80 *Amministrazione delle finanze* v *Salumi* [1981] ECR 2735, at p. 2751, paragraph 10 and in Case 120/86 *Mulder* [1988] ECR 2321, at p. 2352 et seq., paragraph 24 et seq.; David Edward, op. cit.

82 — See, for example, the judgment in Case 24/86 *Blaizot* [1988] ECR 379, at p. 405 et seq., paragraph 25 et seq., and the fundamental judgment in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, at p. 480, paragraph 69 et seq.

83 — Judgment in Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd* v *Robert Bosch GmbH*, cited above, at p. 52.

84 — Judgment in Joined Cases 209/84 to 213/84 *Ministère public* v *Asjes*, cited above, ECR 1425, at p. 1466 et seq.; judgment in Case 66/86 *Ahmed Saeed*, paragraph 20 et seq.

85 — See, for example, Sharpston: 'Legitimate expectations and economic reality', scheduled for publication in *European Law Review*, 1990, p. 76 of the manuscript; judgment in Case 120/86 *Mulder*, cited above.

86 — Judgment in Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53, at p. 87

(1) *Predictability of the application of Article 86*

(a) Predictability despite the block exemption

86. The application of Article 86 was generally predictable for the applicant. This follows from three considerations.

We have seen that in the case of a block exemption the legislature adopts a general, abstract provision which does not and cannot cover conditions on the actual market. An undertaking can therefore not rely on the legislature's assessment being valid for the market in which it occupies a dominant position. Where, as in this case, a patent licensing agreement is involved, the agreement must be measured against Regulation No 2349/84, including paragraph 27 of the preamble, which reads as follows:

'Agreements which come within the terms of Articles 1 and 2 and which have neither the object nor the effect of restricting competition in any other way need no longer be notified. Nevertheless, undertakings will still have the right to apply in individual cases for negative clearance under Article 2 of Council Regulation No 17 or for exemption under Article 85(3)'.

Consequently, the contracting parties are clearly put on notice that their agreement may also have restrictive effects on competition which are not covered by the block exemption, and that they must consider whether it is appropriate, having regard to such effects, to apply for individual exemption or negative clearance. Depending on their position on the market they also have reason to consider the possibility of an infringement of Article 86. The outcome of the examination carried out by the undertakings concerned on the conclusion of the agreement will be influenced by their size and position on the market. Consequently, if the licence is subsequently transferred to another undertaking, that undertaking cannot rely on the agreement's continuing to be unobjectionable. As a result, that undertaking is in the same position as an undertaking concluding such an agreement for the first time and, like such an undertaking, must check that the agreement is permissible in terms of competition law.

87. Second argument: Neither can the fact that the benefit of group exemption may only be withdrawn prospectively be construed by the undertakings concerned as meaning that until the benefit of exemption is withdrawn they do not need to reckon with the application of Article 86 to their conduct.

Admittedly, the applicant points out that the idea behind block exemption is to enable agreements which on the basis of a general, abstract assessment comply with the requirements of Article 85(3) to be concluded effectively under the civil law without a demanding individual examination being carried out.[87] In the applicant's view, the parties to such an agreement should be able to rely on their agreement's effectiveness until such time, if any, as the benefit of the exemption is withdrawn. It considers that it is true that Article 86 does not expressly provide that contracts which infringe that article are null and void, but that consequence might arise under national law. It maintains that this is

87 — In this sense, see also Wiedemann: *Kommentar zu den Gruppenfreistellungsverordnungen des EWG-Kartellrechts*, Vol. 1, 1989, Allgemeiner Teil, p. 122, paragraph 373.

unreasonably hard, not only on the undertaking in a dominant position which is a party to the agreement, but also on the other party, which is often not guilty of any infringement of Article 86.

As we have seen, the possibility of the application of Article 86 is predictable for the undertaking occupying a dominant position, even before the benefit of exemption is withdrawn. It is therefore not entitled to assume that the legal consequences of infringements of Article 86 are conclusively settled by the possibility that the benefit of exemption will be withdrawn. Moreover, I admit that the infringement of Article 86 by an exempted agreement regularly also fulfils the conditions for withdrawal of exemption.[88] On the other hand, the grounds for withdrawing the benefit of exemption extend far beyond abuses within the meaning of Article 86 and include less severe effects on competition as well. It can therefore not be concluded from the fact that provision is made for the withdrawal of exemption for various types of 'less important' cases that an infringement of Article 86 can have no more extensive legal consequences. As a result, the undertaking cannot rely on Article 86 being 'precluded'.[89]

88. Third argument: The applicant considers that, in view of the difficulties in delimiting the relevant market and ascertaining what constitutes a dominant position on the market, no undertaking can be certain whether or not its conduct in concluding an exempted agreement constitutes an abuse. However, undertakings occupying dominant positions are invariably confronted with those problems of definition independently of the existence of a block exemption; despite this the Treaty places them under a duty to make their conduct comply with Article 86. In that connection, it is appropriate to point to the special responsibility of the undertaking in a dominant position to take account of the requirements of competition, which the Court of Justice referred to in the judgment in the *Michelin* case.[90] A block exemption does not alter that special situation of the undertaking in a dominant position which limits its scope for action in comparison with less powerful undertakings.

89. The concept of abuse is also sufficiently precise to serve the undertaking in a dominant position as a guide when concluding exempted agreements. Admittedly, there would possibly not always be a guarantee of that if only the adverse effects on competition were to be selected as the criterion for establishing abuse.[91]

However, if the abuse is also characterized by the fact that the prohibited conduct of the undertaking in a dominant position is a disproportionate method of pursuing its legitimate economic interests, in accordance with the case-law of the Court of Justice which I have analysed and the practice adopted by the Commission in taking its decisions,[92] then undertakings occupying a dominant position have a criterion which enables them to distinguish between agreements constituting an abuse and agreements to which they may accede without infringing the rules on competition.

88 — See, for example, Article 7 of Regulation No 19/65.

89 — A different view is taken by Wiedemann, op. cit., p. 123, paragraph 373.

90 — Judgment in Case 322/81 *Michelin* v *Commission*, cited above, at p 3511, paragraph 57.

91 — Vogel, op. cit., p. 143; see also the Opinion of Mr Advocate General Roemer in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 256, cited above.

92 — A detailed appraisal is to be found in Gyselen: 'Abuse of monopoly power within the meaning of Article 86 of the EEC Treaty: Recent developments', scheduled for publication in the *Annual Proceedings of the Fordham Corporate Law Institute*, 1989, p. 27 et seq. of the manuscript.

90. In that context, the applicant could not reasonably rely on Article 86 not being applied when it took over the exempted patent licensing agreement.

As we know, the applicant did not contest the Commission's findings with regard to the delimitation of the relevant market and to its dominant position in these proceedings and it did not claim that it was ignorant of the chief circumstances on which the Commission bases itself in that regard. The applicant therefore had to reckon on the fact that the whole of its business conduct was liable to be assessed in the light of Article 86.

91. The applicant also had to reckon on the fact that its acquisition of the exclusive patent licence was liable to be regarded as an abuse of a dominant position. It could not have remained ignorant of the restrictive effects on competition directly resulting from that transaction. They arose — without any change in the substance of the agreement — because the applicant as an undertaking in a dominant position acceded to the agreement. In that situation, paragraph 27 of the preamble to Regulation No 2349/84 should have given it cause to consider whether the conditions for exemption really were fulfilled.

Finally, it was also obvious that the acquisition of the exclusive licence was not necessary in order to protect the applicant's legitimate interests. In so far as it was simply a question of its utilizing the sterilization process developed by the British Technology Group in manufacturing its machines, it was plain that a simple licence would also have been sufficient for that purpose.

(b) Additional legal certainty afforded by the possibility of negative clearance

92. Even though the application of Article 86 is sufficiently predictable, doubt may arise in some cases in view of the necessarily general wording of the provision. In that connection, therefore, one must assess the Commission's argument that undertakings in a dominant position may procure for themselves the requisite legal certainty by applying for negative clearance. [93]

93. The applicant considers that the effort involved deprives block exemption of any benefit. It takes the view that the procedure for the grant of negative clearance takes too long and does not give rise to the necessary legal certainty: negative clearance is not binding on the national courts and does not preclude the imposition of a fine on the parties. By applying Article 86 to exempted conduct the Commission undermines the system of block exemptions, whose purpose is to make individual examinations superfluous.

94. It must be conceded to the applicant that the procedure for the grant of negative clearance is to a certain extent at odds with the aim of administrative simplification pursued by the system of block exemption. On the other hand, the system of block exemptions is not intended, as we have just seen, to immunize agreements against an application of Article 86 and provide the parties with legal certainty also in that respect. Neither is the grant of negative clearance in any way alien to that system, as witness in particular paragraph 27 of the preamble to the regulation on patent

93 — Likewise the judgment in Case 85/86 *Hoffmann-La Roche* v *Commission*, cited above, at p. 554, paragraph 130.

licensing agreements, which expressly reserves the relevant undertakings' right to apply for negative clearance.

95. The objection of the duration of the procedure weighs more heavily. It can be a hardship for the parties for them to be unsure for a relatively long time as to whether or not the Commission considers an agreement existing between them to be an abuse. However, any applicant for negative clearance must accept a fairly long period of legal uncertainty during the procedure for the grant of clearance. This is also true for undertakings occupying a dominant position.

96. The parties take the view that an application for negative clearance would not have protected Tetra against the imposition of a fine. Different views are taken on this question in the literature. But it must be pointed out in that connection that in this case the Commission — in my view, rightly — did not impose a fine. Consequently, undertakings can probably rely on the Commission to make cautious use of its power to impose fines in cases of the sort at issue; although it must be observed that this court's decision in these proceedings should eliminate previous uncertainties about the legal situation. Furthermore, fines in this area are also amenable to full review by this court.

The applicant's final claim in this connection, to the effect that negative clearance does not guarantee legal certainty because it is not binding on the national courts, will be considered in the context of its third argument.

(2) *Impairment of a legal relationship established in good faith on the basis of the exemption*

97. The further question as to whether, contrary to a general principle of Community law, a legal relationship established in good faith on the basis of the exemption has been impaired, has already been answered to a large degree in the discussions so far. I shall therefore confine myself to two supplementary remarks, as follows. The original licensing agreement between the National Research and Development Council and Novus Corp., to which the applicant acceded, was concluded in 1981, that is to say long before Regulation No 2349/84 entered into force. As a result, the agreement benefited from exemption after the event and without intervention on the part of the contracting parties; it is therefore not possible to claim that the legal relationship was established in good faith on the basis of the exemption.

98. When the applicant negotiated with the British Technology Group and acquired the licence in 1986, the block-exemption regulation was, however, already in force, but only combined with Article 86. The abuse to which the Commission's charge relates concerns only one aspect of the legal relationship between the applicant and the licensor, namely the exclusive nature of the licence granted. In that respect the applicant could have known that Article 86 was liable to be applied and hence it is not possible to maintain that there was good faith on its part.

99. It must be 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. This point made by the applicant

is a significant one but it does not mean that Article 86 is partially inapplicable (where the party which is not in a dominant position on the market was acting in good faith). Article 86 turns only on the conduct of the undertaking in the dominant position. The solution of such cases must be left to the national law applicable in the particular case, since Article 86 does not deal with the consequences in civil law of an infringement.

III — *Threat to the uniform application of Community law*

100. The applicant's third argument is that the uniform application of Community law would be jeopardized if Article 86 could be applied in spite of the existence of a block exemption. Since Article 86 is directly applicable, national courts could prohibit exempted conduct in the case of an undertaking in a dominant position and thereby circumvent the Commission's decision to permit that conduct, as expressed in the block-exemption regulation. The plaintiff maintains that that is unlawful on the basis of the judgment in *Walt Wilhelm* v *Bundeskartellamt.*

101. In that judgment the Court of Justice held that the fact that a procedure is pending before the Commission under the Community's competition law does not prevent the national authorities from examining the same facts concurrently from the point of view of the national law on cartels. At the same time, the Court of Justice limited that power by stating that 'the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it'.[94] The Court thereby recognized that Community competition law takes precedence over the corresponding provisions of the Member States in the event of a conflict. However, that judgment is concerned only with the relationship which exists between the application of national competition law by national authorities, on the one hand, and the application of Community law by the Commission, on the other. In contrast, the judgment has nothing to say about the application of Community law by national authorities and courts, which is what the applicant's argument is concerned with. Even in its later judgment of 10 July 1980 in Joined Cases 253/78 and 1 to 3/79, which was concerned with the application of French competition law following a decision by the Commission simply closing the file on the case, the Court did not have to adopt a view on that question.[95]

102. In point of fact, the power of the national authorities to apply the Community's competition law is governed, at least in part, by Article 9 of Regulation No 17. Under that article, the power to take the constitutive decision granting exemption under Article 85(3) is reserved to the Commission alone. In addition, the national authorities have concurrent competence to apply Article 85(1) and Article 86, as long as the Commission has not initiated any procedure under Articles 2, 3 or 6 of Regulation No 17.[96] Once the Commission takes action, however, it has sole competence in

94 — Judgment in Case 14/68 *Walt Wilhelm* v *Bundeskartellamt* [1969] ECR 1, at p. 15, paragraph 9.

95 — Judgment in Joined Cases 253/78 and 1/79 to 3/79 *Procureur de la République* v *Bruno Giry and Guerlain* [1980] ECR 2327, at p. 2374 et seq., paragraph 15 et seq.

96 — Article 9(3).

that respect as well. However, this applies only with regard to national cartel authorities and to the national courts responsible for the application of cartel law or the supervision of the cartel authorities. On the other hand, other national courts and authorities continue to have jurisdiction for applying Article 85(1) and Article 86, for instance in civil disputes, even where the Commission has already initiated a procedure. This is because the prohibitions set out in Article 85(1) and Article 86 produce direct rights and duties in relations between individuals which the national courts must enforce. The enforcement of those rights, which the individual holds directly under the Treaty, cannot be curtailed by secondary legislation.[97] The national court can take account of the need for Community competition law to be consistently applied by suspending its proceedings until the Commission has taken a decision.[98]

103. The national courts continue to be under a duty to protect rights in an individual case even after the Commission has terminated its procedure. The Court of Justice has decided this with regard to administrative letters closing the file on the case in a number of proceedings. If the Commission notifies an undertaking in such a letter that it can see no need to take action in respect of a particular agreement, that does not bind the national courts; they may take the view, contrary to the opinion of the Commission, that the agreement infringes Article 85 and is void.[99] The national courts are not even bound by negative clearance granted by the Commission.[100] Although that view is questioned in some quarters, it must be taken because in that case, too, the national courts have to protect the rights of individuals which are conferred on them by the EEC Treaty.

Consequently, neither an administrative letter nor negative clearance from the Commission prevents the national courts from reviewing conduct in the light of the same legal provisions which the Commission employed and reaching a different decision. The view expressed by the Commission in its opinion is merely a factor which the courts may take into account when taking their decision.[101]

104. However, in cases of exemption the situation is different. Under Article 6(1) of Regulation No 17 the Commission decision granting exemption has the effect that Article 85(1) no longer applies to the exempted agreement, decision or concerted practice. All national courts and authorities are bound by this; they may not circumvent the *erga omnes* effect of that decision. Only in the event that the Commission should revoke its decision under Article 8(3) of Regulation No 17 would the decision cease to be binding.

As a legal provision a block-exemption regulation is also binding on the national courts and authorities, although they do have an interpretative jurisdiction in connection with the application of such a regulation. For instance, they may hold that a particular agreement does not comply

97 — Judgments in Case 127/73 *BRT* v *Sabam*, cited above, at p. 62 et seq., as regards Article 86 and in Case 37/79 *Marty* v *Estée Lauder* [1980] ECR 2481, at p. 2500, as regards Article 85(1).

98 — Judgments in Case 48/72 *Brasserie de Haecht* v *Wilkin-Janssen ('Haecht II')* [1973] ECR 77, at p. 86, paragraph 10 et seq. and in Case 37/79 *Marty* v *Estée Lauder*, cited above, at p. 2500, paragraph 14.

99 — See, for instance, the judgment in Case 37/79 *Marty* v *Estée Lauder*, cited above, at p. 2499, paragraph 10.

100 — Opinion of Advocate General Reischl in Case 37/79, *Marty* v *Estée Lauder*, cited above, at p. 2507.

101 — Judgment in Case 37/79 *Marty* v. *Estée Lauder*, cited above, at p. 2499.

with the block-exemption regulation and is therefore caught by the prohibition set out in Article 85(1). The danger of inconsistency can be countered by recourse to the procedure of the preliminary ruling under Article 177, as is illustrated by the case-law of the Court of Justice with respect to the earlier Regulation No 67/67/EEC. [102]

105. All that applies, however, only as regards the prohibition set out in Article 85(1) and not as regards Article 86. My observations on the Commission's power to adopt the contested decision on the basis of Article 86 apply in full with regard to the corresponding powers of the national courts and authorities to apply Article 86. A block exemption does not preclude the competence of the national courts and authorities to assess the abuse of a dominant position against Article 86. In its judgment of 11 April 1989 in the *Ahmed Saeed* case, the Court of Justice also recognized the jurisdiction of the national authorities to apply Article 86 in appropriate circumstances. [103]

106. Contrary to the view taken by the applicant, this outcome does not pose a threat to the uniform application of Community law. On the contrary: it is only if — in addition to the Commission — the national courts and authorities may apply Article 86 in cases such as this that the uniform application of that article will be guaranteed in the Community.

C — Conclusion

107. I have explained the reasons which have led me to take the view that the contested Commission decision does not infringe Articles 85 and 86. I propose that the Court should decide as follows:

'(1) The application is dismissed.

(2) The applicant is ordered to pay the costs.'

102 — See, for instance, the judgment in Case 22/71 *Béqueling Import Co* v. *SAGL* [1971] ECR 949 at p. 961, paragraphs 19 to 22 and in Case 63/75 *Fonderies Roubaix* v *Fonderies Roux* [1976] ECR 111, at p. 118, paragraph 10 et seg. and most recently in Case 161/84 *Pronuptia* [1986] ECR 353, at p. 387, paragraph 33.

103 — Judgment in Case 66/86, paragraph 32.